IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-5549

MICHAEL TAYLOR,
Petitioner,

V.

COMMONWEALTH OF KENTUCKY,
Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE COURT OF APPEALS OF KENTUCKY

J. VINCENT APRILE II
ASSISTANT DEPUTY PUBLIC DEFENDER
625 LEAWOOD DRIVE
FRANKFORT, KENTUCKY 40601

J. Vincent Aprile II
COUNSEL FOR PETITIONER

October 10, 1977

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The petitioner, Michael Taylor, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Kentucky entered on July 11, 1977.

OPINIONS BELOW

The opinion of the Court of Appeals of Kentucky affirming petitioner's conviction was filed on April 1, 1977 and is reported as Taylor v. Commonwealth, Ky., App., 551 S.W.2d 813 (1977). The order of the Supreme Court of Kentucky denying discretionary review in petitioner's case was entered on June 29, 1977. The mandate in petitioner's case was entered by the Court of Appeals of Kentucky on July 11, 1977. Copies of the above-mentioned opinion, order and mandate are attached hereto.

JURISDICTION

The opinion of the Court of Appeals of Kentucky was entered on April 1, 1977. Petitioner's timely motion for discretionary review in the Supreme Court of Kentucky was denied on June 29, 1977. The mandate of the Court of Appeals of Kentucky was issued in petitioner's case on July 11, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

QUESTIONS PRESENTED

1. Whether petitioner was unconstitutionally deprived of his right to due process of law by the refusal of the trial court to give an instruction on the presumption of innocence when petitioner's counsel requested and tendered such an instruction?

2. Whether petitioner was denied his constitutional right to due process by the refusal of the trial court to give an instruction on the indictment's lack of evidentiary value when petitioner's counsel requested and tendered such an instruction?

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved is the 14th Amendment to the Federal Constitution.

STATEMENT OF THE CASE

Petitioner, Michael Taylor, was tried in the Circuit Court of Franklin County in Frankfort, Kentucky on the charge of second degree robbery in violation of Kentucky Revised Statute (KRS) 515.030. Contrary to his plea, petitioner was convicted by a jury of the charged offense and sentenced to five years confinement in the penitentiary. Final judgment was entered against petitioner on June 22, 1976. Notice of appeal was filed on June 24, 1976.

On April 1, 1977 the Kentucky Court of Appeals in a published opinion, with one judge dissenting, affirmed the conviction in petitioner's case, but remanded the case to the trial court for a resentencing due to the trial judge's failure to order the statutorily mandatory presentencing investigation.

Petitioner's timely motion for discretionary review was overruled by the Supreme Court of Kentucky on June 29, 1977. Consequently, the Court of Appeals of Kentucky on July 11, 1977 issued the mandate in petitioner's case.

After the jury was selected in the case at bar, the prosecutor presented his opening statement and concluded by reading the indictment to the jury (Transcript of Evidence, hereinafter designated T.E., pp. 13-14). According to the indictment, petitioner on or about February 16, 1976, committed second degree robbery "when, in the course of committing theft, he used physical force upon James Maddox" and "unlawfully took from Mr. Maddox a wallet containing ten ($10) - fifteen ($15) dollars and his house key" (T.R., p. 3). After petitioner's counsel addressed the jury briefly, the Commonwealth presented its case (T.E., pp. 15-16).

In an effort to prove the charged offense, the prosecution called but one witness, James Maddox, the fifty-one year old victim of the alleged robbery, who testified that he had resided in Frankfort for "about sixteen or seventeen years" and had known petitioner "about fifteen years" (T.E., pp. 16-17).

Mr. Maddox related that about 8:15 p.m. on February 16, 1976 petitioner and another man came to his house and knocked on the door. Although petitioner allegedly demanded to be let in, Mr. Maddox refused and both petitioner and his companion left (T.E., p. 18).

Approximately fifteen minutes later, petitioner and his companion allegedly returned and forced their way into Mr. Maddox's home (T.E., pp. 18-19).

After petitioner and "the other boy" allegedly pushed Mr. Maddox to the ground, petitioner took Mr. Maddox's pocketbook and key from his left pocket and both of them "broke off running" (T.E., p. 19).

Mr. Maddox testified that he had "ten to fifteen dollars" in his wallet as well as various papers and a bus ticket (T.E., pp. 19-20).

After the incident occurred, Mr. Maddox called the police and reported the alleged offense. The prosecutor elicited from Mr. Maddox that he had subsequently taken out a warrant against petitioner and "appeared before the Franklin County Grand Jury to seek an indictment" (T.E., p. 20).

Petitioner, the only defense witness, explained that he was twenty years of age and that he resided with his mother and stepfather in Frankfort (T.E., p. 26). He was employed at George's restaurant and had been for six years (T.E., pp. 25-26).

Petitioner denied under oath that he had committed the acts which Mr. Maddox had related on the witness stand (T.E., p. 27). Furthermore, petitioner asserted that he had never struck Mr. Maddox (T.E., p. 27).

Petitioner testified that he had known Mr. Maddox "about three or four years" and had been to his house "several times" (T.E., p. 27).

During an in-chambers hearing on the instructions, petitioner's counsel objected to the trial court's refusal to give to the jury the instructions tendered by the defense (T.E., p. 36). The instructions requested by the defense, but not given by the trial judge, included instructions on the presumption of innocence (Defense Instruction No. 4) and on the indictment's lack of evidentiary value (Defense Instruction No. 5).

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW AFFIRMING THE TRIAL JUDGE'S REFUSAL, DESPITE DEFENSE OBJECTION, TO INSTRUCT THE JURY ON THE PRESUMPTION OF INNOCENCE CONFLICTS WITH PREVIOUS DECISIONS OF THE SUPREME COURT.

In the case at bar the prosecution presented only one witness, Mr. Maddox, the victim of the alleged robbery (T.E., pp. 16-25). The prosecution introduced no evidence to corroborate Mr. Maddox's testimony. Similarly, the defense called but one witness, the petitioner (T.E., pp. 26-35). With the evidence in this posture, petitioner's trial counsel requested the trial court to give an instruction on the presumption of innocence and even tendered a proposed instruction (T.E., pp. 36; Defense Instruction No. 4, appended to T.E.).

The trial court refused to give any "presumption of innocence" instruction and instead instructed the jury on the substantive offense of second degree robbery, reasonable doubt, and the necessity of a unanimous verdict (T.E., pp. 37-38).

With the knowledge that the trial court had declined to instruct the jury on "the presumption of innocence," the prosecutor during his closing argument vigorously assailed the "presumption of innocence":

> This defendant, like every other defendant who's ever been tried who's in the penitentiary or in the reformatory today, has this presumption of innocence until proven guilty beyond a reasonable doubt. That's just a presumption on his behalf. . . (T.E., p. 43).

The prosecutor's intentional denigration of the presumption of innocence was obviously calculated to influence the jury to resolve the factual issues against petitioner.

Rejecting the argument that petitioner "was substantially prejudiced by the trial court's failure to instruct on presumption of innocence," the Kentucky Court of Appeals in the instant case observed that "[t]he well established law of Kentucky has been that as long as the trial court instructs the jury on reasonable

doubt an instruction on the presumption of innocence is not necessary." Taylor v. Commonwealth, supra at pp. 813-814. The Court of Appeals of Kentucky concluded, "We find no reason to change the established law on this point." Id. at 814.

The analysis advanced by the Kentucky Court of Appeals in petitioner's case reveals a basic misconception of the importance of the presumption of innocence in a criminal trial in this country.

"The right of a fair trial is a fundamental liberty secured by the Fourteenth Amendment. . . The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice." Estelle v. Williams, _____U.S._____, 96 S.Ct. 1691, 1692, 48 L.Ed.2d 126 (1976). Long ago, this Court in Coffin v. United States, 156 U.S. 432, 15 S.Ct. 394, 39 L.Ed. 481 (1985), declared:

> The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law. Id., 156 U.S. at 453, cited with approval in Estelle v. Williams, supra.

In Coffin this Court analyzed the exact issue presented in this petition. In the cited case the trial court refused a presumption of innocence charge, but "it instructed fully on the subject of reasonable doubt." Id., 156 U.S. at 432. Asserting the same contention as that relied upon by the Kentucky appellate court in the case sub judice, the government argued on appeal in Coffin that the reasonable doubt charge obviated the need for an instruction on presumption of innocence. In holding that the refusal to give the requested instruction was reversible error, this Court in Coffin explained:

> The inevitable tendency to obscure the results of a truth, when the truth itself is forgotten or ignored, admonishes that the protection of so vital and fundamental a principle as the presumption of innocence be not denied, when requested, to any one accused of crime. Id., 156 U.S. at 460.

In Coffin, this Court clearly distinguished the presumption of innocence from reasonable doubt. Rejecting the idea that the "presumption of innocence" and "reasonable doubt" are synonymous, this Court observed:

> Concluding, then, that the presumption of innocence is evidence in favor of the accused, introduced by the law in his behalf, let us consider what is "reasonable doubt." It is, of necessity, the condition of mind produced by the proof resulting from the evidence in the cause. It is the result of the proof, not the proof itself, whereas the presumption of innocence is one of the instruments of proof, going to bring about the proof from which reasonable doubt arises; thus one is a cause, the other an effect. To say that the one is the equivalent of the other is therefore to say that legal evidence can be excluded from the jury, and that such exclusion may be cured by instructing them correctly in regard to the method by which they are required to reach their conclusion upon the proof actually before them; in other words, that the exclusion of an important element of proof can be justified by correctly instructing as to the proof admitted. Id., 156 U.S. at 460.

Furthermore, Coffin is not an isolated decision by this Court. The requirement of a presumption of innocence charge was specifically reaffirmed in Cochran v. United States, 157 U.S. 286, 15 S.Ct. 628, 39 L.Ed.704 (1895); Agnew v. United States, 165 U.S. 36, 17 S.Ct. 235, 41 L.Ed. 624 (1897); and Holt v. United States, 218 U.S. 245, 31 S.Ct. 2, 54 L.Ed. 1021 (1910). In Cochran, supra, at 634, this Court stated:

> In the case under consideration, counsel asked for a specific instruction upon the defendants' presumption of innocence, and we think it should have been given. The Coffin Case is conclusive in this particular, and it results that the judgment of the court below must be reversed, and the case remanded, with instructions to grant a new trial.

While the presumption of innocence is similar to the reasonable doubt standard in reminding the jury that the prosecutor bears the burden of proof, their functions are both clearly

distinguishable and independently necessary. The failure to instruct the jury in the case sub judice on the "constitutionally rooted presumption of innocence" was a clear denial of due process. Cool v. United States, 409 U.S. 100, 104, 93 S.Ct. 354, 34 L.Ed.2d 335 (1972).

Indeed, this Court, in an opinion by Mr. Justice Rehnquist, in Cupp v. Naughten, 414 U.S. 141, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973), implicitly stated that anything which would "negate the presumption of innocence" or "dilute," "conflict with," or "'impinge upon' a criminal defendant's presumption of innocence" would be error of constitutional magnitude. Indeed the language of the Cupp opinion leaves no doubt that the jury should be instructed on both the reasonable doubt standard and the presumption of innocence.

As the dissenting opinion of Judge Wilhoit in the instant case explains, the presumption of innocence will lose its value if the trial court fails to inform the jury of this basic constitutional principle. Noting the pragmatic implications of the presumption of innocence instruction, Judge Wilhoit observed:

> There is certainly no such presumption in the minds of jurors about to try a case. In fact, by the time the indictment is read to the jurors, the opposite presumption is likely to be present in their minds. The law builds in the presumption of innocence, but it is of no use to the defendant if the jury is never told about it. Taylor v. Commonwealth, supra at p. 814.

Although acknowledging that "an instruction on reasonable doubt does much the same thing that one on the presumption of innocence would do," Judge Wilhoit expressed belief that "there is a subtle distinction between the two instructions and one does not completely perform the job of the other," citing IX J. Wigmore, Evidence § 2511 (3rd ed. 1940). Id. This analysis conforms to this Court's rejection in Coffin, supra, of the idea that the "presumption of innocence" and "reasonable doubt" are synonymous constitutional principles.

These conflicts justify the grant of certiorari to review the judgment below.

2. THE DECISION BELOW AFFIRMING THE TRIAL JUDGE'S REFUSAL, DESPITE DEFENSE OBJECTION, TO INSTRUCT THE JURY ON THE PRESUMPTION OF INNOCENCE CONFLICTS WITH THE DECISIONS OF THE HIGHEST COURTS OF NUMEROUS STATES.

Numerous state appellate courts have recognized that the failure of the trial judge to instruct on the presumption of innocence constitutes a constitutional error mandating reversal of the defendant's conviction. For example, the Supreme Court of Appeals of West Virginia has proclaimed that "[i]t is a fundamental right of a defendant to have the jury instructed as to the presumption of innocence and we have repeatedly held it to be reversible error for a trial court to fail to do so." State v. Cokely, W.Va., 226 S.E.2d 40, 43 (1976). Indeed, in Virginia, "[t]he failure of the trial court to adequately instruct the jury on the presumption of innocence when such an instruction is requested is reversible error." Allen v. Commonwealth, Va., 180 S.E.2d 513, 516 (1971); Whaley v. Commonwealth, Va., 200 S.E.2d 556 (1973).

Addressing this same question, the Supreme Court of Colorado, sitting en banc, observed that the "failure to instruct on the presumption of innocence constitutes a denial of due process of law" which "requires that the defendant be granted a new trial." People v. Hill, Colo., 512 P.2d 257, 258-259 (1973).

In Georgia, the failure of a trial judge in a criminal case to instruct the jury on the presumption of innocence is error requiring the grant of a new trial because "[t]his presumption is a fundamental protection afforded an accused and is based upon an established principle of common law." Ealey v. State, 141 Ga. App. 94, 232 S.E.2d 620, 620-621 (1977).

Noting that the presumption of innocence "is a cardinal principle which has special significance in criminal cases because of the nature of these proceedings," the Court of Appeals of New Mexico held "[i]t is error to fail to instruct the jury on the presumption of innocence, if defendant requests an instruction thereon." State v. Henderson, 81 N.M. 270, 466 P.2d 116, 118 (1970).

According to the Florida appellate courts, "any proper understanding of the State's burden of proof in a criminal case must begin with an appreciation of" the presumption of innocence. Reynolds v. State, Fla. App., 332 So.2d 27, 29 (1976). Consequently, the trial judge's failure to instruct completely on the presumption of innocence when requested required reversal of the defendant's conviction. Id.

Recognizing that the presumption of innocence is "fundamental to a fair trial," the Supreme Court of Washington held the complete failure of the trial court to instruct sua sponte on the presumption of innocence constituted reversible error. State v. McHenry, Wash., 558 P.2d 188, 190 (1977).

Because the presumption of innocence is a "cardinal principle" with "special significance in criminal cases," the Supreme Court of Illinois has recognized that "[i]t is error to fail to instruct the jury on this presumption" if requested. People v. Long, 407 Ill. 210, 95 N.E.2d 461, 463 (1950).

The following sampling of cases also support petitioner's contention: People v. McClintic, Mich., 160 N.W. 461 (1916); People v. Leavitt, 301 N.Y. 113, 92 N.E.2d 915 (1950); State v. Stoddard, Mont., 412 P.2d 827 (1966); State v. Coleman, Mon., 460 S.W.2d 719 (1970); Gilleylen v. State, Miss., 255 So.2d 661 (1971); and Taylor v. State, Ala., 272 So.2d 905 (1973).

The contention that instructions relating to reasonable doubt obviate the need for an instruction on presumption of innocence has also been rejected in numerous state courts. For example, in People v. Long, supra, the Supreme Court of Illinois stated:

> The contention that instructions relating to proof of guilt beyond a reasonable doubt, in effect, preform the same function as an instruction as to presumption of innocence, is not supported by the decisions of this court. The cases cited above. . . .establish, in principle, that in the absence of an instruction as to presumption of innocence, instructions relating to reasonable doubt of guilt have the effect of depriving a defendant of his presumption of innocence during the phase of the trial when the jury is considering all the evidence. The latter instructions

> concern a degree of guilt, are not compatible with a presumption of innocence, and therefore, when standing alone, deprive a defendant of the benefit of the presumption of innocence. This is also the generally accepted view of both the Federal courts and the courts of last resort in other jurisdictions. Id., 95 N.E.2d at 463.

Expressing this same rationale, the Supreme Court of Virginia has recognized the "presumption of innocence is 'a landmark of the law' and, as such, is not sufficiently met by a reasonable doubt instruction." Whaley v. Commonwealth, supra, at 558. See State v. Henderson and People v. Hill, both supra.

In the final analysis there is no legal nor logical justification for a trial judge's refusal to give an instruction on the presumption of innocence, when such an instruction is requested. The instruction will neither confuse nor mislead the jury. Instead, the instruction is necessary and fair. Refusal to give this instruction, when requested, is arbitrary and constitutes prejudicial error of constitutional magnitude. In People v. Dornblut, 24 A.2d 639, 262 NYS2d 414 (1965), three of the five justices on the appellate panel concurred in the statement that the presumption might in time vanish if appellate courts did not insist on its use in instructions to the jury.

The conflicts detailed above justify the grant of certiorari to review the state court judgment in this case.

3. THE DECISION BELOW AFFIRMING THE TRIAL JUDGE'S REFUSAL, DESPITE DEFENSE OBJECTION, TO INSTRUCT THE JURY ON THE INDICTMENT'S LACK OF EVIDENTIARY VALUE CONFLICTS WITH PREVIOUS DECISIONS OF FEDERAL COURTS OF APPEAL AND A PRIOR DECISION OF THE SUPREME COURT.

After the jury was sworn, the trial judge, in the presence of the jury, told the prosecutor, "Mr. Corns, you may read the indictment and state your case" (T.E., p. 12). At the conclusion of his brief opening statement, the prosecutor informed the jury as follows:

> It's our duty at this time to read to you the indictment that sets forth the charge. Commonwealth of Kentucky versus Michael Taylor, Indictment Number 7844. The Grand Jury charges on or about the 16th day of February, 1976 in Franklin County, Kentucky, the above-named defendant did commit the offense of robbery in the second degree when in the course of committing theft he used physical force upon James Maddox at the latter's residence, 249 Rosewood, Frankfort, Kentucky, and the defendant unlawfully took from Mr. Maddox a wallet containing ten to fifteen dollars and his house key, against the peace and dignity of the Commonwealth of Kentucky, a True Bill, signed John M. Arnold, Foreman of the March, 1976, Franklin County Grand Jury (T.E., p. 14).

Later, during the prosecutor's questioning of James Maddox, the alleged robbery victim, the following colloquy occurred:

> Q. 35 Did you subsequently take out a warrant against Mike Taylor?
>
> A. Yeah.
>
> Q. 36 And then you later appeared before the Franklin County Grand Jury to seek an indictment?
>
> A. Yes, sir (T.E., pp. 20-21; emphasis supplied).

By informing the jury that Mr. Maddox, the prosecution's only witness, had appeared before the Franklin County Grand Jury to seek an indictment, the prosecutor was able to convey to the jurors that the indictment of petitioner was an

explicit affirmation by the grand jury of the veracity of Mr. Maddox's allegation that petitioner robbed him.

In view of the paucity of evidence against petitioner and the prosecutor's calculated emphasis of the grand jury's decision to indict petitioner on the basis of Mr. Maddox's testimony, petitioner's counsel requested the trial judge to give the following instruction (T.E., p. 36):

> The jury is instructed that an indictment is in no way any evidence against the defendant and no adverse inference can be drawn against the defendant from a finding of the indictment. The indictment is merely a written accusation charging the defendant with the commission of a crime. It has no probative force and carries with it no implication of guilt (Defense Instruction No. 5; appended to T.E., following T.E., p. 50).

However, the trial court declined to give any instruction on the indictment's lack of evidentiary value (T.E., pp. 37-38).

Within the context of petitioner's trial, the defense instruction pertaining to the indictment was necessary to protect petitioner's right to a fair trial. In United States v. Schanerman, 150 F.2d 941 (3rd Cir. 1945), the court, in reversing a conviction for the trial judge's failure to give the jury an instruction on the indictment's lack of evidentiary value, observed:

> It seems settled that, where a correct proposition of law essential to the proper determination of an issue submitted to a jury is incorporated by the defendant into a requested special instruction, which is not given in charge to the jury in substance or in effect or is not covered in the general charge of the court, refusal to give the instruction is reversible error. [Citations omitted.]
>
> When requested so to do, as in the instant case, the district court, in clear, unmistakable words, should have charged the jury that the finding of an indictment is no evidence of the guilt of the accused. Id., at 946.

Other decisions requiring an instruction on the evidentiary value of the indictment include: Little v. United States, 73 F.2d 861, 96 ALR 889 (10th Cir. 1934); Cooper v. United States, 9 F.2d 216 (8th Cir. 1925); Gold v. United States, 102 F.2d 350 (3rd Cir. 1939); and Whittlesey v. United States, D.C., 221 A.2d 86 (1966).

Although the reading of the indictment to the jury is not an improper practice, a defendant in most jurisdictions is entitled, upon request, to an instruction that the indictment is only a formal charge and not evidence of guilt.

In Kroll v. United States, 433 F.2d 1282, 1287 (5th Cir. 1970), the defendant asserted on appeal "that it was error for the trial judge to read the indictment to the jury." The Fifth Circuit Court of Appeals rejected that allegation of error because:

> [t]he trial judge's instructions informed the jury that the indictment was not evidence, that it did not raise a suspicion of guilt, and that it was merely the method by which persons are charged and brought to trial. [Citations omitted.] Id., at 1287.

Similarly, in United States v. Strobe, 431 F.2d 1273, 1275 (6th Cir. 1970), the defendants had moved for a mistrial because, subsequent to the selection of the jury, but prior to the introduction of any evidence, "the [trial] judge had read the indictment to the prospective jurors." Answering this allegation of error, the Sixth Circuit Court of Appeals explained:

> Having at the time of the reading of the indictment, and in the general charge, thoroughly and properly instructed the jury as to the function of the indictment in a criminal case the court was correct in overruling the motion for a mistrial. Id., at 1275.

It is obvious that once the indictment is read to the jury, the defense, upon request, is entitled to an instruction which informs the jury that the indictment has no evidentiary value.

The Kentucky Court of Appeals summarily rejected petitioner's contention that he was substantially prejudiced

by the trial court's failure to instruct on the indictment's lack of evidentiary value, noting that they found "no merit" in petitioner's argument that "failure to give such an instruction denies the defendant due process of the law." Taylor v. Commonwealth, supra, at p. 814.

After acknowledging that "[t]he presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice," this Court in Estelle v. Williams, ____U.S. ____, 96 S.Ct. 1691, 1692, 48 L.Ed.2d 126 (1976), articulated the methodology by which the presumption of innocence functions to insure no substantial deviation from the constitutionally mandated "fair trial." "To implement the presumption, courts must be alert to factors that may undermine the fairness of the fact-finding process." Id., 96 S.Ct. at 1693. Reasoning from this premise, this Court concluded, "In the administration of criminal justice, courts must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt." Id., 96 S.Ct. at 1693, citing In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

In the case at bar, the trial court's refusal to instruct the jury, in accordance with the defense request, that "an indictment is in no way any evidence against the defendant," that "no adverse inference can be drawn against the defendant from the finding of the indictment," that the indictment "is merely a written accusation," having "no probative force" and carrying "no implication of guilt," obviously diluted the constitutional principle that guilt must be established by probative evidence beyond a reasonable doubt. In the absence of the requested instruction, the jury was allowed to speculate that the grand jury's indictment was an explicit endorsement of Mr. Maddox's credibility and, hence, further evidence of petitioner's guilt. Under these circumstances, particularly in view of the sparsity of the prosecution's evidence, the trial court's refusal to give the "indictment" instruction was substantial error of constitutional dimension.

These conflicts justify the grant of certiorari to review the judgment below.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals of Kentucky.

Respectfully submitted,

J. Vincent Aprile II
J. VINCENT APRILE II
ASSISTANT DEPUTY PUBLIC DEFENDER
625 LEAWOOD DRIVE
FRANKFORT, KENTUCKY 40601

COUNSEL FOR PETITIONER

Michael TAYLOR, Appellant,

v.

COMMONWEALTH of Kentucky, Appellee.

Court of Appeals of Kentucky.

April 1, 1977.

Discretionary Review Denied June 29, 1977.

Defendant was convicted before the Franklin Circuit Court, Henry Meigs, J., of second-degree robbery, and he appealed. The Court of Appeals, Howard, J., held that refusal to give defendant's requested instruction on presumption of innocence was not error; that failure to instruct on indictment's lack of evidentiary value did not deny defendant due process; that defendant was not entitled to reversal of conviction on basis of prosecutor's unobjected to references to facts which related to defendant's character; but that failure to make a presentencing investigation before defendant was sentenced and failure to consider probation or conditional discharge was error.

Affirmed in part; reversed in part.

Wilhoit, J., dissented and filed opinion.

1. Criminal Law ⇐829(9)

Refusal to give accused's requested instruction on presumption of innocence was not error in prosecution for second-degree robbery, in view of fact that an instruction on reasonable doubt was given. KRS 515.030.

2. Constitutional Law ⇐268(2)

In prosecution for second-degree robbery, failure to instruct on indictment's lack of evidentiary value did not deny accused due process. KRS 515.030.

3. Criminal Law ⇐1037.1(1)

Accused was not entitled to reversal of conviction of second-degree robbery on basis of prosecutor's unobjected to references, during closing argument, to facts which related to accused's character and which had not been placed into evidence, in view of indication that such references did not meet the standard of prejudice of being so apparent and great as to result in a manifest injustice. KRS 515.030.

4. Criminal Law ⇐986

In prosecution for second-degree robbery, failure to make a presentencing investigation before accused was sentenced and failure to consider probation or conditional discharge was error. KRS 515.030, 532.050, 533.010.

J. Vincent Aprile, II, Asst. Public Defender, Frankfort, for appellant.

Guy C. Shearer, Asst. Atty. Gen., Frankfort, for appellee.

Before HAYES, HOWARD and WILHOIT, JJ.

HOWARD, Judge.

Michael Taylor was convicted by a Franklin Circuit Court jury of violating *Ky.Rev. Stat.* Ch. 515.030 (hereinafter KRS), to wit second degree robbery. Evidence was presented that Taylor along with an accomplice went twice to the home of James Maddox on the evening of February 16, 1976. On the second visit when Maddox again would not allow them to enter his home, Taylor hit him and took his wallet and house key. Taylor and Maddox were the only witnesses to testify at the trial. Maddox testified that he had known Taylor for approximately 15 years and was certain he was the person who robbed him. The appellant denied the robbery testifying that he was in a parked automobile with three other persons the entire evening.

[1] Defense counsel tendered and requested that an instruction on presumption of innocence be given to the jury. The trial court refused the request, but gave an instruction on reasonable doubt. The appellant contends that he was substantially prejudiced by the trial court's failure to instruct on presumption of innocence. We find no evidence to support this contention. The well established law of Kentucky has been that as long as the trial court instructs the jury on reasonable doubt an instruction on the presumption of innocence is not necessary. *Mink v. Commonwealth*, 228 Ky. 674, 15 S.W.2d 463 (1926); *Swango v. Commonwealth*, 291 Ky. 690, 165 S.W.2d 182 (1942). We find no reason to change the established law on this point.

[2] The second error appellant asserts on appeal is that he was substantially prejudiced by the trial court's failure to instruct on the indictment's lack of evidentiary value. We find no merit in the appellant's argument that failure to give such an instruction denies the defendant due process of the law.

[3] In his closing argument the prosecutor made reference to facts which had not been placed into evidence concerning the defendant's character. While the Kentucky court has held in several cases that such remarks are improper and allowed reversal of the case on that point, the defendant failed to object to these remarks thus not preserving them for appellate review. *Lynch v. Commonwealth*, Ky., 472 S.W.2d 263 (1971). We do not feel that the statements meet the standard of prejudice of being so apparent and great as to result in a manifest injustice as set forth in *Ferguson v. Commonwealth*, Ky., 512 S.W.2d 501 (1974) and *Futrell v. Commonwealth*, Ky., 437 S.W.2d 487 (1969), to allow reversal on the impropriety in the argument despite defendant's failure to object at the proper time.

[4] The appellant contends that no presentencing investigation was made in his case as required by KRS 532.050 before he was sentenced nor was the question of probation or conditional discharge as provided in KRS 533.010 considered. It appears after examining the record that these allegations are correct. The recent Supreme Court case of *Brewer v. Commonwealth*, Ky., —— S.W.2d —— (1977) (24 Ky.Law Summary 1) held that the requirements of KRS 532.050 are mandatory and not within the discretion of the trial court judge. In regard to KRS 533.010 the Supreme Court in *Brewer, supra* stated that this determination by the court is discretionary rather than mandatory but stated that the statute requires that probation or conditional discharge be given consideration.

Therefore, we find no error in the verdict of the jury, but we do find error in the trial court's sentencing procedure. On the latter point, this case is reversed with directions to the Franklin Circuit Court to take appropriate action consistent with this opinion.

HAYES, J., concurs.

WILHOIT, J., dissents.

WILHOIT, Judge, dissenting.

I respectfully dissent from so much of the opinion of the majority as holds that an instruction on the presumption of innocence when requested need not be given by the court because the instruction on reasonable doubt suffices. It strikes me as bordering on the fatuous to say that a jury must be instructed on one of the most basic principles of our criminal law but not the other. The reason given for this anomaly in Kentucky jurisprudence has heretofore been that an instruction on the presumption of innocence is "too favorable to the defendant", *Swango v. Commonwealth*, 291 Ky. 690, 165 S.W.2d 182 (1942). Most of those rights embodied in the modern concept of due process are "favorable to the defendant", but that is their very reason for existence. Not every person charged in a criminal complaint or indicted by a grand jury is guilty of a crime. In recognition of this, our system has built in certain safeguards to protect the innocent. One of these safeguards is the so-called presumption of innocence of a criminal defendant. There is certainly no such presumption in the minds of jurors about to try a case. In fact, by the time the indictment is read to the jurors, the opposite presumption is likely to be present in their minds. The law builds in the presumption of innocence, but it is of no use to the defendant if the jury is never told about it.

While an instruction on reasonable doubt does much the same thing that one on the presumption of innocence would do, I believe there is a subtle distinction between the two and one does not completely perform the job of the other. As pointed out by Wigmore, the concept of presumption of innocence "cautions the jury to put away from their minds all of the suspicion that arises from the arrest, the indictment, and the arraignment and to reach their conclusion solely from the legal evidence adduced." He further points out that this caution is "indeed particularly needed in criminal cases". IX J. Wigmore, *Evidence* § 2511 (3d ed. 1940).

I believe the Supreme Court of Kentucky would now reject the old line of cases relied upon by the majority.

Albert THOMPSON et al., Appellants,

v.

KENTUCKY POWER COMPANY, a corporation, Appellee.

Court of Appeals of Kentucky.

April 8, 1977.
Discretionary Review Denied
June 29, 1977.

Appeal was taken from the Lawrence Circuit Court, W. B. Hazelrigg, J., dismissing an attempted appeal to that court from a condemnation judgment entered in the county court. The Court of Appeals, Cooper, J., held that appeal from judgment of county court in condemnation action was not perfected as required by statutes and rules and, hence, was properly dismissed by circuit court where period of eight years which lapsed between time judgment was entered by county court and time original appeal was filed with circuit court was unreasonable, and appellants not only failed to file a copy of judgment with clerk of circuit court within 30 days from date of judgment, but also failed to revive action in name of representative or successor of deceased landowners against whom judgment was taken.

Affirmed.

1. Dismissal and Nonsuit ⇐60(1), 62

Application of rule that a defendant may move for dismissal of an action or of any claim against him for failure of plaintiff to prosecute or to comply with rules or any order of court is a matter that is within discretion of court. CR 41.02.

2. Eminent Domain ⇐257

Strict adherence to procedures set forth in statute for filing an appeal from a judgment authorizing a petitioner to take possession of land or material is required by courts in all condemnation suits. KRS 416.280.

3. Eminent Domain ⇐257

Procedures set forth in statute for taking an appeal from a judgment authorizing a petitioner to take possession of land or material are full and complete and must be followed by landowner. KRS 416.280.

4. Eminent Domain ⇐257

Failure of a landowner to file an appeal bond as required by statute setting forth procedures for taking an appeal from a judgment authorizing a petitioner to take possession of land or material warrants dismissal of appeal. KRS 416.280.

5. Eminent Domain ⇐257

Appeal from judgment of county court in condemnation action was not perfected as required by statutes and rules and, hence, was properly dismissed by circuit court where period of eight years which lapsed between time judgment was entered by county court and time original appeal was filed with circuit court was unreasonable, and appellants not only failed to file a copy of judgment with clerk of circuit court within 30 days from date of judgment, but

COMMONWEALTH OF KENTUCKY

Court of Appeals

MANDATE

MICHAEL TAYLOR

File No. CA-152-MR
VS. Opinion Rendered APRIL 1, 1977

Appeal From FRANKLIN
Circuit Court Action No. IND. #7844

COMMONWEALTH OF KENTUCKY

The Court being sufficiently advised, it seems the judgment herein is erroneous, in part.

It is therefore considered that the judgment be affirmed in part and reversed in part with directions to correct the judgment in conformity with the views expressed in the opinion herein; which is ordered to be certified to said court.

JUNE 29, 1977 - Movant's Discretionary Review denied by the Supreme Court.

A Copy - Attest:

Issued ...July 11, 1977.....

JOHN C. SCOTT, CLERK

CA-7

OPINION RENDERED: April 1, 1977
TO BE PUBLISHED

COURT OF APPEALS OF KENTUCKY

NO. CA-152-MR

MICHAEL TAYLOR — APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE HENRY MEIGS, JUDGE
CRIMINAL ACTION NO. 7844

COMMONWEALTH OF KENTUCKY — APPELLEE

AFFIRMING IN PART; REVERSING IN PART

*** * * * * * * * *** * * * * * * * ***

BEFORE: HAYES, HOWARD, and WILHOIT, Judges.

HOWARD, JUDGE. Michael Taylor was convicted by a Franklin Circuit Court jury of violating Ky. Rev. Stat. Ch. 515.030 (hereinafter KRS), to wit second degree robbery. Evidence was presented that Taylor along with an accomplice went twice to the home of James Maddox on the evening of February 16, 1976. On the second visit when Maddox again would not allow them to enter his home, Taylor hit him and took his wallet and house key. Taylor and Maddox were the only witnesses to testify at the trial. Maddox testified that he had known Taylor for approximately 15 years and was certain he was the person who robbed him. The appellant denied the robbery testifying that he was in a parked automobile with three other persons the entire evening.

Defense counsel tendered and requested that an instruction on presumption of innocence be given to the jury. The trial court refused the request, but gave an instruction on reasonable doubt. The appellant contends that he was substantially prejudiced by the trial court's failure to instruct on presumption of innocence. We find no evidence to support this contention. The well established law of Kentucky has been that as long as the trial court instructs the jury on reasonable doubt an instruction on the presumption of innocence is not necessary. Mink v. Commonwealth, 228 Ky. 674, 15 S.W. 2d 463 (1926); Swango v. Commonwealth, 291 Ky. 690, 165 S.W. 2d 182 (1942). We find no reason to change the established law on this point.

The second error appellant asserts on appeal is that he was substantially prejudiced by the trial court's failure to instruct on the indictment's lack of evidentiary value. We find no merit in the appellant's argument that failure to give such an instruction denies the defendant due process of the law.

In his closing argument the prosecutor made reference to facts which had not been placed into evidence concerning the defendant's character. While the Kentucky court has held in several cases that such remarks are improper and allowed reversal of the case on that point, the defendant failed to object to these remarks thus not preserving them for appellate review. Lynch v. Commonwealth, Ky., 472 S.W. 2d 263 (1971). We do not feel that the statements meet the standard of prejudice of being so apparent and great as to result in a manifest injustice as set forth in Ferguson v. Commonwealth, Ky., 512 S.W. 2d 501 (1974) and Futrell v. Commonwealth, Ky., 437 S.W. 2d 487 (1969), to allow reversal on the impropriety in the argument despite defendant's failure to object at the proper time.

The appellant contends that no presentencing investigation was made in his case as required by KRS 532.050 before he was sentenced nor was the question of probation or conditional discharge as provided in KRS 533.010 considered. It appears after examining the record that these allegations are correct. The recent Supreme Court case of Brewer v. Commonwealth, Ky., ____ S.W. 2d ____ (Jan. 14, 1977) (24 Ky. Law Summary 1) held that the requirements of KRS 532.050 are mandatory and not within the discretion of the trial court judge. In regard to KRS 533.010 the Supreme Court in Brewer, supra stated that this determination by the court is discretionary rather than mandatory but stated that the statute requires that probation or conditional discharge be given consideration.

Therefore, we find no error in the verdict of the jury, but we do find error in the trial court's sentencing

procedure. On the latter point, this case is reversed with directions to the Franklin Circuit Court to take appropriate action consistent with this opinion.

Judge Hayes concurring. Judge Wilhoit dissenting.

Attorney for the Appellant:

Hon. J. Vincent Aprile, II
Assistant Deputy Public Defender
625 Leawood Drive
Frankfort, KY 40601

Attorney for the Appellee:

Hon. Guy C. Shearer
Assistant Attorney General
Capitol Building
Frankfort, KY 40601

COURT OF APPEALS OF KENTUCKY

CA-152-MR

MICHAEL TAYLOR — APPELLANT

V. — APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE HENRY MEIGS, JUDGE
INDICTMENT NO. 7844

COMMONWEALTH OF KENTUCKY — APPELLEE

DISSENTING

* * * * * *

WILHOIT, JUDGE: I respectfully dissent from so much of the opinion of the majority as holds that an instruction on the presumption of innocence when requested need not be given by the court because the instruction on reasonable doubt suffices. It strikes me as bordering on the fatuous to say that a jury must be instructed on one of the most basic principles of our criminal law but not the other. The reason given for this anomaly in Kentucky jurisprudence has heretofore been that an instruction on the presumption of innocence is "too favorable to the defendant", Swango v. Commonwealth, 291 Ky. 690, 165 S.W.2d 185 (1942). Most of those rights embodied in the modern concept of due process are "favorable to the defendant", but that is their very reason for existence. Not every person charged in a criminal complaint or indicted by a grand jury is guilty of a crime. In recognition of this, our system has built in certain safeguards to protect the innocent. One of these safeguards is the so-called presumption of innocence of a criminal defendant. There is certainly no such presumption in the minds of jurors about to try a case. In fact, by the time the indictment is read to the jurors, the opposite presump' 'on is likely to be present in their minds. The law

builds in the presumption of innocence, but it is of no use to the defendant if the jury is never told about it.

While an instruction on reasonable doubt does much the same thing that one on the presumption of innocence would do, I believe there is a subtle distinction between the two and one does not completely perform the job of the other. As pointed out by Wigmore, the concept of presumption of innocence "cautions the jury to put away from their minds all of the suspicion that arises from the arrest, the indictment, and the arraignment and to reach their conclusion solely from the legal evidence adduced." He further points out that this caution is "indeed particularly needed in criminal cases". IX J. Wigmore, Evidence § 2511 (3d ed. 1940).

I believe the Supreme Court of Kentucky would now reject the old line of cases relied upon by the majority.

Attorney for Appellant:

J. Vincent Aprile, II
Ass't Public Defender
625 Leawood Drive
Frankfort, Ky. 40601

Attorney for Appellee:

Guy C. Shearer
Ass't Attorney General
Capitol Building
Frankfort, Ky. 40601

John C. Scott
Clerk

OFFICE OF
CLERK OF COURT OF APPEALS
FRANKFORT, KENTUCKY 40601

U.S. 127 Twilight Trail
564-7920

CERTIFICATION

I, Jeanette Trusty, do hereby certify that the foregoing Opinion Affirming in Part and Reversing in Part, rendered April 1, 1977; and Mandate issued July 11, 1977, in the case of Michael Taylor vs. Commonwealth of Kentucky, are true and correct copies as same appear on file in my office.

Done this 16th day of September, 1977, at Frankfort, Kentucky.

Jeanette Trusty

Jeanette Trusty, Deputy Clerk
Court of Appeals of Kentucky

SUPREME COURT OF KENTUCKY
SC-249-D

MICHAEL TAYLOR — MOVANT

V.

COMMONWEALTH OF KENTUCKY — RESPONDENT

ORDER DENYING MOTION TO SUPPLEMENT RECORD AND ORDER DENYING DISCRETIONARY REVIEW

The motion of the Commonwealth of Kentucky that it be permitted to supplement the record in this proceeding is denied.

The motion of Michael Taylor for a review of the decision of the Court of Appeals is denied, and the decision stands affirmed.

ENTERED June 29, 1977.

Chief Justice

MARTHA LAYNE COLLINS
CLERK

OFFICE OF THE CLERK
SUPREME COURT OF KENTUCKY
STATE CAPITOL, FRANKFORT, 40601

ROOM 209
(502) 564-4720

I, Martha Layne Collins, Clerk of the Supreme Court of Kentucky, do hereby certify that the attached Order entered by the Court on June 29, 1977, in the case of Michael Taylor vs. Commonwealth of Kentucky, File No. SC-249-D, is a true and correct copy as it appears on file in my office.

Done this 16th day of September, 1977, at Frankfort, Kentucky.

Martha Layne Collins
Clerk

page 45
CORRECTED COPY

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-5549

MICHAEL TAYLOR, PETITIONER

v.

COMMONWEALTH OF KENTUCKY, RESPONDENT

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

PETITION FOR CERTIORARI FILED OCTOBER 11, 1977
CERTIORARI GRANTED NOVEMBER 28, 1977

INDEX

Chronological List of Relevant Docket Entries

March, 1976—Defendant Michael Taylor was indicted in the Franklin Circuit Court in Frankfort, Kentucky for the offense of second degree robbery.

May 24, 1976—Contrary to his plea, defendant Michael Taylor was tried and convicted by a jury in the Franklin Circuit Court of the charged offense of second degree robbery and sentenced to confinement in the penitentiary for five years.

June 22, 1976—Final judgment was entered against defendant.

June 24, 1976—Defendant Michael Taylor filed notice of appeal in the Franklin Circuit Court.

April 1, 1977—Court of Appeals of Kentucky rendered its opinion in defendant's case and affirmed the conviction.

June 29, 1977—Supreme Court of Kentucky denied defendant's motion for discretionary review of the decision of the Kentucky Court of Appeals.

July 11, 1977—Court of Appeals of Kentucky issued mandate in defendant's case.

Franklin Circuit Court

INDICTMENT No. 7844

COMMONWEALTH OF KENTUCKY, PLAINTIFF

v.

MICHAEL TAYLOR, DEFENDANT

Transcript of Record on Appeal

(2)

FRANKFORT POLICE COURT
CHARGE and INFORMATION SHEET

☐ SIGHT ARREST
☐ WARRANT
☐ SUMMONS

51-9 ARREST NO.
2-15-74 ARREST DATE

A. ACCUSED Lionheart Lorayne Taylor Jr. Negro 3-7-56
FULL NAME RACE SEX D.O.B.
303 E 3rd Frankfort
ADDRESS HOME TEL. SOC. SEC. NO.
EMPLOYMENT BUS. TEL. PLACE OF BIRTH
5'2" 115 lbs Green blk dark
HEIGHT WEIGHT EYES HAIR COMPLEXION
ALIAS SCARS AND MARKS

B. OFFENSE Robbery 2nd degree
CHARGE K.R.S. or CITY ORDINANCE NO.
DATE TIME LOCATION
DETAILS Pick-up from detectives

A-C-D-E
EVIDENCE SEIZED
Lic & C.
OTHER PERSONS CHARGED

C. ARRESTING OFFICER(s) Lay Jr.

D. COMPLAINTANT James Madden B M
NAME RACE SEX AGE HOME TEL.
George Taylor's Liquor Store
ADDRESS EMPLOYMENT BUS. TEL.

E. WITNESSES
NAME ADDRESS EMPLOYMENT BUS. TEL. HOME TEL.

THIS PAGE TO BE COMPLETED BY POLICE OFFICER

F. BOND $2500 — AMOUNT — TYPE BOND — RELEASE DATE 2-18-76

G. COUNSEL Mike Judy — COURT DATE — JURY TRIAL DATE

H. RECORD OF NOTIFICATION OF WITNESSES:

	WHEN NOTIFIED AND BY WHOM					SUBPOENAS AND BENCH WARRANTS			
	ORIG COURT DATE	RESKED / DATE	RESKED / DATE	RESKED / DATE	RESKED / DATE	Rec. By	Date	Serve By	Date
1. ACCUSED Michael Taylor									
2. ATTY.	[redacted]					[redacted]			
3. COMPLAINTANT									
4. ARREST. OFF. [illegible]	[redacted]								
5. WITNESSES									

I. COURT APPEARANCE RECORD

DATE	DISPOSITION	ARRAIGNMENT
2-18-76	Cont. 2-23-76 for Court Appt. atty & set trial	
2/23/76	Cont. 2-25-76 for atty. atty Mike Judy	
2/25/76	Rep. Mike Judy. P.N.G. Preliminary Trial Held. Defendant held to the Franklin Co. Grand Jury. Bond to remain the same	
	CAPIAS #	

(POLICE OFFICER TO COMPLETE ALL BLANKS MARKED *) Appealed ☐ DATE

FRANKLIN CIRCUIT COURT

Commonwealth of Kentucky

vs.

Michael Taylor

Jury Verdict: G: 5yrs.

Defendant

No. 7847

KRS 515.030

The Grand Jury charges:

On or about the 16th day of February, 19 76 in Franklin County, Kentucky,

the above named defendant did commit the offense of robbery in the second degree when, in the course of committing theft, he used physical force upon James Maddox, at the latter's residence, 249 Rosewood, Frankfort, Kentucky, and the defendant unlawfully took from Mr. Maddox a wallet containing ten ($10) — fifteen ($15) dollars and his house key,

against the peace and dignity of the Commonwealth of Kentucky.

A TRUE BILL

John M Arnold
Foreman of the Grand Jury

Com A 11

WITNESSES: Mr. James Maddox, 249 Rosewood, Frankfort, Kentucky.

No. 7844

COMMONWEALTH OF KENTUCKY

INDICTMENT FOR

Vs. MICHAEL TAYLOR

KRS 515.030
Robbery in the Second Degree

A TRUE BILL

John M. Arnold
Foreman of the Grand Jury

Presented to the Franklin Circuit Court by the Foreman of the Grand Jury in the presence of the Grand Jury and filed in open Court this

____ day of _____, 19____.

_____
Clerk Franklin Circuit Court

By: _____, D. C.

Bond $ _____

Ray Corns
Commonwealth Attorney
48th Judicial District

FRANKLIN CIRCUIT COURT

COMMONWEALTH OF KENTUCKY PLAINTIFF

FILED
APR 5 1976
JAMES E. COLLINS
CLERK FRANKLIN CIRCUIT COURT

VS. NO. 7844

MICHAEL TAYLOR DEFENDANT

The defendant being present in open Court and represented by his attorney, Hon. Michael L. Judy, and the Commonwealth being present, the defendant in person and by his attorney waived formal arraignment and entered a plea of not guilty to the charges contained in the indictment.

The Commonwealth and the defendant are to agree on a time for pre-trial conference, the defendant to remain on his same bond.

This 5th day of April, 1976.

Henri M. Williams, Jr.
JUDGE, FRANKLIN CIRCUIT COURT
DIVISION II

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FRANKLIN CIRCUIT COURT

7844

COMMONWEALTH OF KENTUCKY — PLAINTIFF

VS.

ORDER

FILED
APR 23 1976
JAMES E. COLLINS
CLERK FRANKLIN CIRCUIT COURT

MICHAEL TAYLOR — DEFENDANT

On motion of counsel for Commonwealth, this cause is hereby assigned for trial at 10:00 A. M. Monday, May 24, 19 76, in the Circuit Court Room.

Spencer Williamson
JUDGE, FRANKLIN CIRCUIT COURT

HAVE SEEN:

Counsel for Plaintiff

Counsel for Defendant

FRANKLIN CIRCUIT COURT

COMMONWEALTH OF KENTUCKY — PLAINTIFF

VS. TRIAL ORDER AND VERDICT

MAY 26, 1976

MICHAEL WAYNE TAYLOR — DEFENDANT

This matter having come on for trial with the defendant being present in person and represented by his attorney, Michael L. Judy, and the Commonwealth being present and represented by Hon. Ray Corns, both plaintiff and defendant announced ready for trial.

Thereupon, a jury was duly empaneled and after peremptory challenges, the following jury was selected to well and truly try the issues and a true verdict render:

Michael Payton	Margie Cable	William Sanders
Nancy Forsee	Ella Faye Sandlin	Lois Ueltschi
Jane Clark	Murita F. Lee	Ann L. Bryant
Susan Williamson	Robert McCann	Gretchen Johnson

The jury was sworn and instructed as to their duties in trying said action.

The attorney for the Commonwealth made his opening statement and presented his proof.

Thereafter, the attorney for the defendant made his opening statement and presented his proof.

At the conclusion of all the evidence the Court instructed the jury as to the law of the case, and the jury retired to deliberate their verdict. After due deliberation, the jury returned into open Court the following verdict:

"We, the jury, find the defendant guilty under Instruction No. I and fix his punishment at five (5) years in the penitentiary.

/s/ William C. Sanders, Jr.
Foreman"

This the 24th day of May, 1976.

JUDGE, FRANKLIN CIRCUIT COURT
DIVISION I

November, 1975

FRANKLIN CIRCUIT COURT

Frankfort Kentucky, June 22, 19 76

COMMONWEALTH OF KENTUCKY
Plaintiff

V.

MICHAEL WAYNE TAYLOR
Defendant

JUDGMENT

On Indictment No. (s): 7844

On the charge(s) of: Robbery in the Second Degree

This 22nd day of June, 19 76, the defendant Michael Wayne Taylor appeared in open court with his attorney, Michael L. Judy, and Ray Corns appeared as attorney for the Commonwealth, the court informed the defendant that he has been found guilty of the crime of Robbery in the Second Degree by (~~the Court~~) (a jury) on his plea of (not) guilty, the court inquired of the defendant and his counsel whether they had any legal cause to show why judgment should not be pronounced, and afforded defendant and his counsel an opportunity to make statements in the defendant's behalf and to present any information in mitigation of punishment, and no sufficient cause was shown why judgment should not be pronounced, and it is therefore by the court:

ADJUDGED that the defendant is guilty of the crime of Robbery in the Second Degree and his punishment is fixed at confinement under the custody of the Bureau of Corrections for a period of Five (5) years; and it is FURTHER ORDERED AND ADJUDGED that this sentence of Five (5) years shall run (~~concurrently with~~) (consecutive to and begin at the expiration of) the sentence of One (1) years imposed on the defendant under Indictment No. 7739 of the Franklin Circuit Court; and it is FURTHER ORDERED AND ADJUDGED that the County Sheriff shall deliver the defendant to the custody of the Bureau of Corrections hereunder at such location within this state as the Bureau shall designate, **a total of Six (6) years.**

ADJUDGED that pursuant to KRS 532.120 it is ordered that the defendant shall receive jail credit time of fifty-two (52) days on the within sentence imposed.

After fixing sentence, the court informed the defendant of his right to appeal to the Court of Appeals of Kentucky with the assistance of counsel, and of his right to a free appeal, including free counsel and free transcript if he could not afford same. Pending appeal (defendant's bail is fixed at $ ————)(defendant is to be held without bail).

Circuit Judge

FRANKLIN
Circuit Court

Attested as a true copy of Judgment entered on the 22nd day of June, 1976, in Order Book 13, Page 425, and signed by

Henry Meigs
Circuit Judge

Clerk, Franklin Circuit Court

FRANKLIN CIRCUIT COURT
CRIMINAL DIVISION
INDICTMENT NO. 7844

COMMONWEALTH OF KENTUCKY PLAINTIFF

VS: ORDER

MICHAEL TAYLOR DEFENDANT

The defendant, Michael Taylor, having filed his Notice of Appeal and the Court having heretofore declared the defendant to be entitled to proceed in forma pauperis and the defendant having requested leave to proceed on appeal in forma pauperis and the Court having now sustained said Motion and the Clerk of this Court and the official Court Reporter being now directed to prepare the necessary transcript and record for such appeal, IT IS FURTHER ORDERED that the Franklin County Fiscal Court pay to the official Court Reporter of this Court the costs of the necessary transcript on appeal upon submission of her statement of same, together with an attested copy of this Order.

Entered this 24 day of June, 1976.

JUDGE, FRANKLIN CIRCUIT COURT

ATTEST:

Clerk, Franklin Circuit Court

FRANKLIN CIRCUIT COURT
CRIMINAL ACTION NO. 7844

COMMONWEALTH OF KENTUCKY PLAINTIFF

VS: NOTICE OF APPEAL

MICHAEL TAYLOR DEFENDANT

Notice is hereby given that the defendant, Michael Taylor, appeals the final judgment and order of this Court entered on June 22, 1976, in this action, with said appeal to be made to the Supreme Court of the Commonwealth of Kentucky.

This 24 day of June, 1976.

Respectfully submitted,

JOHNSON, JUDY & GAINES

BY: Michael L. Judy
Michael L. Judy, Public Defender
326 West Main Street
Frankfort, Kentucky 40601
Attorney for Michael Taylor

This is to certify that a true copy of the foregoing Notice of Appeal has been served upon the Commonwealth by mailing a true copy of same to the Hon. Ray Corns, Commonwealth Attorney, Bridge Street, Frankfort, Kentucky, on this 24 day of June, 1976.

Michael L. Judy
Attorney for Defendant

Franklin Circuit Court—Criminal Division

INDICTMENT No. 7844

COMMONWEALTH OF KENTUCKY, PLAINTIFF

v.

MICHAEL TAYLOR, DEFENDANT

Transcript date: May 24, 1976

(14)

[2] APPEARANCES:

Hon. RAY CORNS, Commonwealth's Attorney, Bridge Street, Frankfort, Kentucky 40601; for the Commonwealth.

Hon. MICHAEL L. JUDY, Attorney at Law, 326 West Main Street, Frankfort, Kentucky 40601; for the defendant.

The following is the Transcript of the trial held in the above-captioned case on the 24th day of May 1976, in the Franklin Circuit Courtroom, Franklin county Courthouse, Frankfort, Kentucky, before the Honorable Henry Meigs, Judge, Division One, beginning at about the hour of 10:00 a.m.

[4] The COURT. All right. The case of Commonwealth of Kentucky against Michael Taylor is called for trial. What says the Commonwealth?

Mr. CORNS. Commonwealth is ready, Your Honor.

The COURT. What says the defendant?

Mr. JUDY. The defense is ready, Your Honor.

The COURT. Call twelve jurors.

[Whereupon, the following twelve jurors were called and sworn by the Court: Michael Peyton, Margie Gable, Gus Smith, Jr., Christine Noblitt, Ella Faye Sandlin, Lois Ulche, Jane Clark, Loretta Faye Lee, Susan Williamson, Robert McCann, Ann L. Bryant, and Gretchen Johnson.]

Mr. CORNS. May it please the Court, Mr. Judy, ladies and gentlemen. I'm Ray Corns, the Commonwealth Attorney. It's our duty to prosecute criminal cases in Franklin Circuit Court. The matter coming before you today is a criminal case, the Commonwealth of Kentucky vs. Michael Taylor.

Mr. Taylor is the one that's seated at the far end of defense counsel's table.

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Do any of you know him, his family, close friends or associates?

[5] He's represented in this case by Mr. Mike Judy. Mr. Judy is a partner in the law firm of Johnson, Judy and Paul Gaines. Has or does that law firm represent you or any member of your family?

Do any of you know Mr. Judy personally?

The charge against this defendant is he committed the offense of second degree robbery last February the 16th against Mr. James Maddox, the gentleman who's seated over here at the prosecution's table.

Do any of you know Mr. Maddox?

You do?

Ms. BRYANT. Yes.

Mr. CORNS. Would the fact that you know Mr. Maddox preclude you from rendering a fair and impartial verdict in this case?

Ms. BRYANT. No.

Mr. CORNS. Mr. Smith?

Mr. SMITH. No.

Mr. CORNS. It would not.

This is a charge, if the defendant is convicted, carries a penalty of from five to ten years. Is there any of you who if you found the defendant guilty would not be able to fix his punishment between those limits, five to ten years, in prison?

Now, the prosecution has only one witness in this [6] case and that's all that we're ever required to have generally. Would that fact alone, the fact that there's only one witness for the prosecution, keep you from returning a verdict of guilty against the defendant if you believe the prosecution's witness?

The evidence will be to the effect that Mr. Maddox was deprived of his billfold at the time he was robbed.

It contained some ten or fifteen dollars, his personal papers and his house key. Is there anyone of you whom if you found that to be the case would still not be able to return a verdict of guilty and fix his punishment between five to ten years?

Do you know of any reason, perhaps known only to yourself, why you couldn't serve on this case? Just one final question and this is the main question which I or Mr. Judy shall ask you. If you sit in this case will you give both sides, the prosecution and the defendant, a fair trial? Will you do that?

Commonwealth passes the jury, Your Honor.

The COURT. Mr. Judy.

Mr. JUDY. May it please the Court, Mr. Corns, ladies and gentlemen. I'm Mike Judy and as Mr. Corns indicated I practice in the law firm of Johnson, Judy & Gaines [7] here in Frankfort.

Sitting right there is Michael Taylor who lives in this comunity and is charged with this indictment here with second degree robbery.

You all understand an indictment is only a charge, the initiating paper which brings us here today, and that in and of itself the indictment is no evidence, no way. It's merely a document that gets us here to this stage in the proceedings. Do you understand that's not to be considered as evidence?

How many of you have sat on a jury before, this term?

Two of you indicated that you know the complaining witness, I believe, Mrs. Bryant you indicated and if I could just inquire briefly, do you just know him by name?

Mrs. BRYANT. I just know him. I don't know him personally. I've been around him for years.

Mr. JUDY. Well, let me ask you this. After hearing the evidence you believe the Commonwealth has sustained its burden and found beyond a reasonable doubt the guilt of my client, Mike Taylor, would it embarrass you later to have to see Mr. Maddox and would you feel like you would have to explain to him your verdict or you feel that you could set aside the [8] friendship or just the fact that you know him, render a verdict and not feel accountable for it?

Ms. BRYANT. I've never sat on a jury before. I don't know too much about it.

Mr. JUDY. Right. Well, the fact that you know him, that's not going to enter into your deliberation as to the guilt or innocence of Mike here?

Ms. BRYANT. I dont know him personally. I just know him when I see him.

Mr. JUDY. Okay. Thank you. Mr. Smith, if I could inquire as to how——

Mr. SMITH. I know where he works. That's the only thing that I know.

Mr. JUDY. And how long have you known him, sir?

Mr. SMITH. Three or four years, I guess.

Mr. JUDY. Okay.

Now, have any of you been represented by or close friends of Mr. Corns, our Commonwealth attorney?

I take it by your silence that you're not.

The assistant Commonwealth attorney is Mr. Richard Prewitt. He's not here today. Have any of you ever been represented by Richard or other members of his firm, Prewitt & Prewitt, Allen, Sr. and Allen, Jr.?

Have any of you heard anything about this case or ever read anything about it?

[9] Have any of you heard or know anything about this particular case?

Have any of you ever had occasion or the necessity to take out a warrant or to institute criminal proceedings before?

I take it by your silence that you haven't.

I'm sure you all will agree to this final question as regards the principle of innocence or reasonable doubt. Do each of you all agree and understand that Mike Taylor as he sits there today is a young man who is presumed to be innocent of the charge of second degree robbery, that this innocence has to be overcome by the Commonwealth to meet a standard of what we call beyond a reasonable doubt and that in the event that at the conclusion of the evidence, you have a reasonable doubt then it is your duty to return a verdict of not guilty. Do each of you understand the principle of innocence, the requirement of reasonable doubt? That reasonable doubt must be removed in order to find a verdict of guilty?

Do each of you understand that principle and I try to make it as elementary as I can. Lawyers sometimes have a tendency to make things complicated but I hope I made it sufficiently clear.

[10] I take it by your silence that each of you does understand.

Thank you.

The COURT. Take your list.

Mr. CORNS. Commonwealth takes the jury, Your Honor.

The COURT. Take your list, Mr. Judy.

Mr. JUDY. Thank you, Your Honor. We'd like to deliberate for just a moment if we could.

The SHERIFF. Gus Smith, Christine Noblitt are excused.

The COURT. Call two more jurors.

[Whereupon, Mr. William Sanders and Nancy Forsee were sworn by the Court.]

Mr. CORNS. These questions will be directed to the last two members that have just joined the panel. Have you heard the questions I asked previously?

Mr. SANDERS. Yes, sir.

Ms. FORSEE. Yes, sir.

Mr. CORNS. Having heard those questions do you know of any reason why either of you could not serve as a juror?

Mr. Judy, when he talked to the jurors, advised that each defendant is presumed innocent until proven guilty beyond a reasonable doubt. If you serve in this case will you follow that rule of law?

If, however, the Commonwealth does prove to your [11] satisfaction beyond a reasonable doubt that this defendant did commit the crime with which he's charged, will you return a verdict of guilty?

Do you know of any reason why, if you return a verdict of guilty, you could not fix his punishment between five and ten years in prison for second degree robbery?

If both of you serve will you give both the prosecution and the defense a fair trial?

Commonwealth passes, Your Honor.

Mr. JUDY. May it please the Court, Mr. Corns.

I also direct my attention to the last two who came on. You all were sitting in the back. Could you hear the questions that I generally asked?

Was there any question that I asked that you might have registered a reply in your mind that you would have answered if you had been sitting on the panel at that time?

Do either of you know socially or have you been represented by Mr. Corns or Mr. Prewitt?

Have either of you had the opportunity to take out a warrant initiating an action in court?

Do both of you subscribe to the principle of law and the Judge will instruct you that the defendant is presumed innocent until proven guilty with [12] sufficient proof to prove beyond a reasonable doubt for you to return a verdit of guilty?

Do you both recognize that it is equally a part of your duty as a juror to return a verdict of not guilty if you believe or have a reasonable doubt and that your duty is just as well served in returning a verdict of not guilty if you so believe as a guilty verdict if you believe he's guilty beyond a reasonable doubt?

Thank you.

The COURT. Take your licks, Mr. Corns.

Mr. CORNS. Commonwealth takes the jury, Your Honor.

The COURT. Commonwealth accepts the jury.

Mr. JUDY. Defendant accepts the jury, Your Honor.

[Whereupon, the following jurors were sworn to well and truly try the issues in this case: Michael Peyton, Margie Gable, William Sanders, Nancy Forsee, Ella Faye Sandlin, Lois Ulche, Jane Clark, Morita Faye Lee, Susan Williamson, Robert McCann, Ann L. Bryant, and Grethen Johnson.]

The COURT. Mr. Corns, you may read the indictment and state your case.

[13] Mr. CORNS. May it please the Court, Mr. Judy, ladies and gentlemen. At this time in the trial of every case the attorneys for both sides are afforded the opportunity to briefly tell the jurors in narrative form what their evidence will be. So, very briefly I want to tell you what the evidence will be for the Commonwealth.

The evidence will consist of statements given under oath here by one witness only, the complaining witness, Mr. James Maddox, who sits here at prosecution's table. The substance of this evidence will be that Mr. Maddox has known this defendant, Michael Wayne Taylor, for perhaps fifteen years or more, that Mr. Taylor for some time had come over to Mr. Maddox's house over on this side of the river on Wilkinson Boulevard and they would socialize and he would even provide this boy with a beer to drink and on the evening in question Mr. Maddox will tell you that this defendant and another black subject who has not been identified or apprehended, came to his residence between 7:30 and a quarter of eight on that evening and that he asked them to leave because he had to get up early to go to work at George Taylor Liquor Store here on Broadway. He will tell you that these boys left and that in about fifteen minutes they came back again and knocked on his door and this defendant struck him on his head with his fist and knocked him down and while he was down the other subject held him and the defendant took his house key, Mr. Maddox's house key out of his pocket and that he also took out of another pocket of his [14] clothing his wallet containing some ten to fifteen dollars in cash, his personal papers and social security card, his birth certificate and his rent receipt for the month.

That will be the essence of the evidence of the Commonwealth except that this defendant and the other black subject then fled and Mr. Maddox came down and took out the warrant and the Grand Jury returned this indictment.

It's our duty at this time to read to you the indictment that sets forth the charge. Commonwealth of Kentucky versus Michael Taylor, Indictment Number 7844. The Grand Jury charges on or about the 16th day of February, 1976 in Franklin County, Kentucky, the above-named defendant did commit the offense of robbery in the second degree when in the course of committing theft he used physical force upon James Maddox at the latter's residence, 249 Rosewood, Frankfort, Kentucky, and the defendant unlawfully took from Mr. Maddox a wallet containing ten to fifteen dollars and his house key, against the peace and dignity of the Commonwealth of Kentucky, a True Bill, signed John M. Arnold, Foreman of the March, 1976, Franklin County Grand Jury.

On the basis of the evidence I've stated the Commonwealth will prove all the elements of this charge and will ask you to return a verdict of guilty and fix this defendant's punishment between five and ten years in prison.

Thank you.

The COURT. Mr. Judy, do you care to make a statement [15] at this time?

Mr. JUDY. Yes, Your Honor. I will make a statement at this time.

Ladies and gentlemen, as Mr. Corns indicated this is the opening statement to give you some little inclination as to what the case is about.

Michael Taylor, whom I represent, will testify, take the stand, although he's not required to and will tell you that he has known the complaining witness for a number of years and he considered himself to be a friend of this gentleman who's taken on these proceedings against him. But he will deny that he ever struck, knocked down the complaining witness, that he ever took anything from him and that he was even,

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will deny he was at the premises on the 16th of February when this thing was alleged to have happened.

He will tell you that Mr. Maddox, the complaining witness, has an apartment over in the project and that this apartment is regularly open to people who want to come over there and drink beer, play cards, watch T.V., just generally do whatever they want to do. He'll tell you that he's been there on occasion, that even a few days before the 16th he was there, that he was there with his brother, another fellow, they were watching T.V. and drank some beer and he'll tell you that Mr. Maddox generally kept beer and he gave it to them. I think he'll tell you he's under age; he's twenty years of age, and that I believe to your [16] satisfaction we will convince you that he's not the fellow who's charged or should be charged with knocking this complaining witness down and taking his wallet. I believe at the conclusion of the evidence that you'll be convinced that Mr. Maddox is in fact confused, that he's got his dates and times and people mixed up and that these proceedings were not properly brought against Michael Wayne Taylor and at the conclusion will render a verdict of not guilty.

Thank you.

The COURT. Call your witness.

Mr. CORNS. The Commonwealth calls James Maddox.

* * * * *

The witness, Mr. James Maddox, having been duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. CORNS:

Q. 1. State your name, please.

A. My name is James Maddox.

Q. 2. Where do you live, Mr. Maddox?

A. 349 Rosewood Drive.

Q. 3. Is that in Frankfort, Franklin County, Kentucky?

A. Yes, sir.

Q. 4. How long have you resided there?

[17] A. Huh?

Q. 5. How long have you lived there?

A. I lived there about sixteen or seventeen years.

Q. 6. How old are you, Mr. Maddox?

A. Going on fifty-one (51).

Q. 7. What educational training have you had, how far did you go in school?

A. Fifth grade.

Q. 8. Fifth grade. Where are you employed?

A. George Taylor Liquor Store.

Q. 9. Is that down here on Broadway?

A. Yes, sir.

Q. 10. How long have you been working down there?

A. Oh, about ten or twelve years.

Q. 11. What was your salary at the time this incident occurred? How much money were you making per week working at the George Taylor Liquor Store last February?

A. Oh, about eighty (80) some dollars.

Q. 12. That would be about $80.00 gross a week?

A. Yeah.

Q. 13. Tell the jurors how long you have known this defendant, Michael Wayne Taylor.

A. I've known him about fifteen years.

Q. 14. Fifteen years. Tell them how many times he's come [18] over to your place before February the 16th? How many times has he been over there? Do you have any idea?

A. Well, I'd say about three times.

Q. 15. How many times?

A. Three.

Q. 16. He'd been over there about three times before February the 16th. What would you and he do when he came over there before the night of the 16th?

A. We just sat around a drank a couple of beer, talked and listened to T.V.

Q. 17. What time did he come to your residence on the night of February the 16th, 1976?

A. He came there about 8:15.

Q. 18. 8:15. And just in your own words tell the jury what happened.

A. Well, Mike Taylor came to my house and knocked on the door. I opened the door and he said let us in. I opened the door and I said boy, I got to go to bed. I got to get up early in the morning and go back to work and he said okay and they left and they came back about fifteen more minutes and they knocked on the door again and said you ain't going to bed and push their way in.

Q. 19. He told you you weren't going to bed?

A. Yeah. They pushed themselves in. I opened the [19] door and let them in and I said boy, I got to go to bed. He said no you ain't neither so I said well, I'll call the police and get you out of my house and I stepped out the door and this other boy jumped on my back and Mike Taylor hit me in the side of the head.

Q. 20. Who hit you in the side of the head?

A. MIKE. He hit me in the side of my head and then he wrestled me, the other boy, Mike Taylor pushed me down on the ground and Mike Taylor wrestled with my pocket and got my pocketbook out and got my key and then broke off running.

Q. 21. In which pocket did you have your house key?

A. Right there in the left pocket.

Q. 22. Who took the house key out of your pocket?

A. Mike Taylor.

Q. 23. Would you point out to the jury the Mike Taylor about whom you're talking?

A. Fellow sitting right over there (indicating the defendant).

Q. 24. Where did you have your wallet located?

A. In my back pocket.

Q. 25. Who got that out of your back pocket?

A. Mike Taylor.

Q. 26. How much money, if any, did you have in your wallet?

[20] A. I had ten to fifteen dollars.

Q. 27. What other papers, if any, Mr. Maddox, did you have in your wallet?

A. Had my Social Security, my rent paper where I paid my rent, my bus ticket.

Q. 28. Have you ever received your wallet back?

A. No.

Q. 29. Did you ever get your money back?

A. No.

Q. 30. Did you ever get any papers back?

A. No.

Q. 31. Have you ever gotten your house key back?

A. No, sir.

Q. 32. And your residence is located in Frankfort, Franklin County, Kentucky?

A. Yes.

Q. 33. Is that correct?

A. Yes.

Q. 34. After this took place what did you do?

A. I went and called the police on them and they come by there and I told them what happened.

Q. 35. Did you subsequently take out a warrant against Mike Taylor?

A. Yeah.

Q. 36. And then you later appeared before the Franklin County Grand Jury to seek an indictment?

[21] A. Yes, sir.

Q. 37. How long did you say you had known Michael Taylor? How many years?

A. About Fifteen.

Q. 38. Did you know the other person who was with him on that night?

A. No, sir.

Q. 39. You'd never seen him before?

A. No.

Q. 40. Have you seen him since that time?

A. Well, I seen him one time.

Q. 41. But you still don't know who he is?

A. No.

Mr. CORNS. That's all.

The COURT. Cross examine.

CROSS EXAMINATION

By Mr. JUDY:

Q. 1. Sir, I'd like to ask you. Did you say your name was Maddox or Matlock?

A. Maddox.

Q. 2. Sir?

A. M-A-D-D-O-X.

Q. 3. And you live on Rosewood Drive down in the project off Wilkinson Street, is that right?

[22] A. Yes, sir.

Q. 4. And you work at George Taylor Liquor Store. How are you employed there? In what capacity are you employed?

The COURT. What's your job at the liquor store?

A. Oh, well, working selling beer and whiskey, carry out.

Q. 5. Are you a bartender?

A. Yes, sir.

Q. 6. And how long have you worked there?

A. Oh, I'd say about ten or twelve years.

Q. 7. And you indicated to us the events that happened. What day of the week did this happen on that you were knocked down and your wallet was taken?

A. Happened on Monday.

Q. 8. Had you worked that day?

A. Yes, sir.

Q. 9. And had you done any entertaining, have anybody over that day, that afternoon after work?

A. No.

Q. 10. You haven't had other people over at your place though, haven't you?

A. Yes, sir.

Q. 11. And you provided beer for them, isn't that correct?

A. Yeah.

[23] Q. 12. You had even had Mike Taylor and some of his friends or some other people that maybe live in the project, they've been over at your house on occasions, haven't they?

A. That's right.

Q. 13. And you'd provided beer for them, hadn't you?

A. I give them beer when they ask me for it.

Q. 14. All right. Now, this place that you lived in, is it an apartment or is it a house or what is it, Mr. Maddox?

A. It's a apartment.

Q. 15. And how long have you lived at this apartment?

A. Oh, I'd say about ten or eleven years, something like that.

Q. 16. Now, what time of day did you say that Mike Taylor supposedly came to your place on the 16th?

A. About 8:15.

Q. 17. And was anybody else there in the apartment with you?

A. No.

Q. 18. Did you allow the boys in? Did they come, did they actually get inside for any length of time?

A. Not unless I let them in.

Q. 19. Did you let them in?

A. Yeah, I let them in.

[24] Q. 20. And did you give them a beer or anything while they were in there?

A. Not the night they robbed me I didn't.

Q. 21. Not that night. What did they do when they came, when you let them in?

A. Well, they just walked on in. I told them, I said boys I've got to go to bed and they went back out again and the next time they come and knocked on my door and they forced their way in.

Q. 22. Do you normally go to bed at 8:15?

A. No. I go to bed right around 9:00.

Q. 23. Had you had anything to drink that night?

A. No.

Q. 24. You hadn't had anything to drink on that Monday?

A. No.

Q. 25. Do you wear glasses or do you ever wear glasses?

A. No.

Q. 26. Do you own a pair of glasses?

A. No, sir.

Q. 27. All right. If you recall, what was the weather like that day?

A. Oh, it's about like it is today.

Q. 28. About like today?

A. Yes.

Q. 29. Now, just want to go over it one more time. In your [25] own eyes you believe Mike Taylor knocked you down and took your wallet away from you, is that what you're telling this jury?

A. Yes, sir.

Mr. JUDY. That's all I have.

Mr. CORNS. No further questions, Your Honor.

Thank you, Mr. Maddox.

[Witness excused.]

Mr. CORNS. That's the case for the Commonwealth, Your Honor.

Mr. JUDY. I would like to make the appropriate motion, Your Honor.

[Whereupon, the following was heard in Chambers.]

Mr. JUDY. At the conclusion of the Commonwealth's evidence comes the defendant and moves the Court to enter an order directing a verdict in favor of the defendant herein, on the grounds that the Commonwealth has failed to meet its burden of proof and make out a prima facie case setting forth the elements of the offense changed in the indictment herein, against the [26] defendant, Michael Wayne Taylor, and therefore, a verdict of not guilty should be entered.

The COURT. Let it be overruled.

* * * * *

The witness, MR. MICHAEL WAYNE TAYLOR, having been duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. JUDY:

Q. 1. State your name for the record.
A. Michael Wayne Taylor.
Q. 2. How old are you, Mr. Taylor?
A. Twenty.
Q. 3. And where do you reside?
A. Where do I stay in other words?
Q. 4. Where do you live?
A. With my mother, step father.
Q. 5. And where do they live?
A. 303 East Third Street.
Q. 6. And are you employed?
A. Yes, sir.
Q. 7. And where are you employed?
A. George's restaurant.
Q. 8. How long have you been employed there?
[27] A. For the past five years, six.

Q. 9. Now, you've heard Mr. Maddox indicate and tell this jury that on Monday, February the 16th you came to his residence, tried to gain entry and he refused, said he wanted to go to bed and you then knocked him down and took his wallet. Now, did you in fact ever knock him down, try to gain entry or take his wallet from him?

A. No, sir. I've never had a reason to do anything like it.

Q. 10. Did you do that on that day?

A. No, sir. I didn't.

Q. 11. And have you ever struck him?

A. No, sir. I haven't.

Q. 12. Now, how long have you known Mr. Maddox?

A. About three or four years.

Q. 13. And have you been to his house on other occasions?

A. Several times. Several times.

Q. 14. And have you been there when he was there and in his company and in the company of other people?

A. Yes, sir.

Q. 15. And what generally happened on occasions when you would be there?

A. Like he said, we sat around and drank, watched television, played cards, talked, you know, different [28] things.

Q. 16. Now, has that been over the span of the last few years?

A. Yes, sir.

Q. 17. Now, were you at his residence on the 16th of February?

A. No, sir.

Q. 18. Prior to that day, had you on any other previous day been to his residence?

A. Maybe a few days before.

Q. 19. A few days before. Do you recall who you were with if anybody and do you recall what you did when you were there?

A. Yes, sir.

Q. 20. Who were you with?

A. Robert Chenault and my brother, Bill.

Q. 21. What's your brother's name?

A. William Taylor.

Q. 22. And what did you do while you were there?

A. Just drank beer and sat around and talked.

Q. 23. Now, on the 16th of February which was a Monday, what did you do that day?

A. Well, I came out about 11:00 that morning and I worked, cleaning up the restaurant, left the restaurant and I think I went up on the college for [29] awhile. All right. I come back downtown. I went home.

I laid down for awhile then I went out around 7:00 that night. It was raining. All right. I was with two other guys, you know, and we sat in the car from 7:00 till about 2:00 in the morning in the rain, you know, just like fire come, a ball of fire rolled in the street, hit a power plant in South Frankfort and knocked all the lights out and everything and I can prove that I was in the car.

Q. 24. Where were you all parked? Were you down in——

A. Right in front of that grocery over on Murray Street.

Q. 25. And on that night did you all leave at any time and go over to where Mr. Maddox's apartment is?

A. No. The car wasn't even running.

Q. 26. Was the car broken down?

A. Yes, sir.

Q. 27. Whose car was it?

A. Fellow named Robert Hayden.

Q. 28. And who else was with you?

A. This guy by the name of, well, my cousin for one. He left and this other guy named Wade got in.

Q. 29. What's his name? What's your cousin's name?

A. Robert Davis. This other fellow named Wade got in the car, you know.

Q. 30. And did you at any time since the taking of this [30] warrant talk to Mr. Maddox or learn the circumstances surrounding his taking this warrant out against you?

A. No, sir. I didn't even know he had a warrant for me. I didn't even know it. The police picked me up. I was going to some work and they picked me up. I didn't even know what was going on.

Q. 31. All right. Have you ever had an occasion to want to strike Mr. Maddox?

A. We've always been too close for that.

Q. 32. You all have been friends?

A. We've been friends ever since I've known him.

Q. 33. And you've been in his house on several occasions?

A. Yes, sir.

Mr. JUDY. That's all.

CROSS EXAMINATION

Mr. CORNS:

Q. 1. You say you're twenty years of age?

A. Yes, sir.

Q. 2. How much education and training have you had?

A. Ninth grade.

Q. 3. Where did you say you're employed?

A. George's Restaurant.

Q. 4. Where is that located?

[31] A. I don't know exactly the address but it's on Murray Street.

Q. 5. On Murray Street?

A. Sells food and stuff.

Q. 6. Is that what they call Spencer's Cafe?

A. Yes, sir.

Q. 7. How long did you say you worked there?

A. Past five years.

Q. 8. What were your working hours there?

A. I just worked like a couple of hours, maybe three or four hours a day, cleaned up in the morning.

Q. 9. You just cleaned up?

A. Yes, sir. Before and after lunch.

Q. 10. And how much did you get paid a day for cleaning up?

A. They paid me $40.00 a week for doing it. They didn't pay me by the hour.

Q. 11. Now, on the day in question what did you say you did after you cleaned up at 11:00?

A. I went to the college.

Q. 12. How long did you stay at Kentucky State University?

A. I stayed about a couple of hours, I guess.

Q. 13. That would be about what, 1:00?

A. Yeah, I guess so.

Q. 14. What did you do after that?

A. I went back home and laid down. I was feeling bad, [32] you know.

Q. 15. Had a what?

A. I was just feeling bad. I went home and laid down.

Q. 16. So you got back home about what time?

A. About maybe say 2:00, 2:30, something like that.

Q. 17. And you went to bed?

A. Yes, sir.

Q. 18. How long did you stay in bed?

A. It was about 2:30 when I went to bed and it was about 7:00 when I woke up.

Q. 19. So you were in bed then till 7:00, is that right?

A. Yes.

Q. 20. You live with whom?

A. My mother.

Q. 21. And your step father?

A. Right.

Q. 22. Do you have any brothers and sisters?

A. Yes, sir.

Q. 23. How many at the house besides your mother and your step father and you?

A. One other brother.

Q. 24. Was he living there on the 16th day of February?

A. No, sir.

Q. 25. Where was he?

A. Yes, sir. Yes, sir. He was there.

[33] Q. 26. When you got up about 7:00 what did you do next?

A. That's when I got in the car.

Q. 27. Where was the car located?

A. On Murray Street in front of George's.

Q. 28. How many other people were in the car?

A. At first there was two, then there was another. He got out and another got in the car, laid down in the back seat and went to sleep.

Q. 29. So there were four other people besides you who were in the car sometime that evening, is that right?

A. Yes, sir.

Q. 30. How long did you stay in the car yourself?

A. From the time I got out of bed and got up. I'd say from 7:30 to 2:00 in the morning.

Q. 31. So you sat in this car approximately seven hours then?

A. Right.

Q. 32. And during that course of time four other people were in the car?

A. Right.

Q. 33. What did you do while you were in the car?

A. Just sitting. It was raining, you know, just sat there.

Q. 34. And you were feeling so badly you had to go to bed but you went out and sat in the car for seven hours?

[34] A. That was during the time that I first come home.

Q. 35. But you were feeling better?

A. I took medicine.

Q. 36. You're telling the jury now, if I get it correct, that you were feeling badly when you came back from Kentucky State?

A. Right.

Q. 37. You went to bed?

A. Right.

Q. 38. And about 7:00 of a night you say it was raining you'd taken some medicine and you went out and sat in the car until 2:00 in the morning, is that right?

A. Right.

Q. 39. You heard Mr. Maddox testify that he had known you for a few years. He told the truth, didn't he?

A. Yes, sir.

Q. 40. You heard him testify that you had been down at his house on Rosewood on previous occasions, hadn't you?

A. Right.

Q. 41. He told the truth, didn't he?

A. Yes, sir.

Q. 42. You heard him testify that he knew you real well, didn't you?

[35] A. Right.

Q. 43. He told the truth, didn't he?

A. Yes, sir.

Mr. CORNS. That's all.

RE-DIRECT EXAMINATION

By Mr. JUDY:

Q. 1. Mr. Taylor, did he tell the truth when he said that you hit him over the head and took his wallet?

A. No, sir.

Q. 2. Have you ever had an occasion to talk with him that when he's indicated to you that his memory, he's got trouble remembering things?

A. Yes, sir. I'd been to his house and he told me he didn't even remember who had been to his house, you know.

Mr. CORNS. I object. That was not on direct examination or cross examination.

The COURT. Overruled.

Mr. JUDY. That's all I have, Your Honor.

Mr. CORNS. No further questions.

[Witness excused.]

[36] Mr. JUDY. That's the case for the defendant, Your Honor.

The COURT. Ladies and gentlemen, we'll recess for a few minutes. You're not to discuss the case among yourselves or let anyone else discuss it with you. If anyone attempts to do so you must report it immediately to the Court.

[Whereupon, the following was heard in Chambers:]

Mr. JUDY. Comes the defendant and moves the Court to enter an order directing a verdict in favor of the defendant herein on the grounds that the Commonwealth has failed to meet its burden of proof and make out a prima facie case setting forth the elements of the offense charged in the trial herein, against the defendant, Michael Wayne Taylor, and therefore, a verdict of not guilty should be entered.

The COURT. Overruled.

Mr. CORNS. I object to the unlawful taking instruction because it is a misstatement. If he admitted being there I think he would be entitled to the instruction.

Mr. JUDY. The defendant objects to the failure of the Court to give the tendered instructions two, three,

four, five and six and for failure to state the whole law of the case and under the objection which will [37] be dictated at the conclusion of the trial.

[Whereupon, the following was heard in open Court:]

The COURT. All right. These are your instructions as to the law applicable to the facts you've heard in evidence from the witness stand in this case.

Number one, you will find the defendant guilty under this instruction if and only if you believe from the evidence beyond a reasonable doubt all of the following: A. That in this county on or about February 16, 1976 and before the finding of the indictment herein, he the defendant stole a sum of money and a house key from James Maddox, 249 Rosewood, Frankfort, Kentucky; and B. in the course of so doing he used physical force on James Maddox. If you find the defendant guilty under this instruction you will fix his punishment at confinement in the penitentiary for not less than five nor more than ten years in your discretion.

Number two, if upon the whole case you have a reasonable doubt as to the defendant's guilt you will find him not guilty. The term 'reasonable doubt' as used in these instructions means a substantial doubt, a real doubt, in that you must ask yourself not whether a better case might have been proved but whether after hearing all the evidence you actually doubt that the defendant is guilty.

Number three, the verdict of the jury must be [38] unanimous and be signed by one of you as foreman. You may use the form provided at the end of these instructions for writing your verdict.

There is appended to these instructions a form with alternate verdicts, one of which you will use: A.

We the jury find the defendant not guilty; B. We the jury find the defendant guilty under instruction number one and fix his punishment at blank years in the penitentiary.

Mr. Judy.

Mr. JUDY. May it please the Court, Mr. Corns, ladies and gentlemen. For those of you who haven't sat on a jury before this is what's called closing argument. It hasn't been a long trial but it's been a very serious, very, very serious matter and the brevity of it should not lend you to think anything but that it is a serious matter. What we're talking about here today is the liberty of a young man who's just turned twenty years of age, for a period of five to ten years and that's a long time when you think back to what a five year period or ten year period of your life has comprised. So, your responsibility is enlarged by the fact that you have two ways you can go, two outs—one, you can find the boy if you believe beyond a reasonable doubt he is guilty, a period of five to ten years or not guilty is the other one and I believe is the most appropriate.

My responsibility is especially acute because I realize that, you know, after I sit down I don't have the [39] opportunity to get back up again and speak on behalf of Michael Wayne Taylor, that the responsibility of realizing that when I sit down possibly his fate for a period, a significant period of his life rests in your hands. So if I should call attention, your attention, fail to call your attention to something that is important I hope that you won't hold that against me. I hope that you will fully deliberate this matter. It's a very serious matter.

There's no question but what we have testimony which are on completely opposite sides of the pole

there. You can choose as you like to believe Mr. Maddox who admitted, has admitted that he had had young people down to his place over in the project, people under twenty-one, he's given beer to them, and that they've socialized with him and it kind of turns out as far as I'm concerned, that's kind of a neighborhood hangout.

Mr. CORNS. Objection.

The COURT. You're testifying now.

Mr. JUDY. The testimony and the effect of the testimony, of course, you all have heard, you all have had an opportunity to view and to see the principle people—Mr. Maddox and Mike Taylor. It's your all's duty to weigh and decide as finders of the fact who you believe.

Michael Taylor has taken the stand under oath and has told you about himself, has told you that he did not rob Mr. Maddox and knock him down and take his wallet. There's been no showing of any motive of why Michael Taylor would do that. There's [40] been no showing that Michael Taylor was destitute, poverty stricken, that he needed money. There's been no showing that Michael Taylor had anything in for Mr. Maddox, to the contrary—he knew him. Now, I can submit to you that if Michael Taylor was going to rob somebody he certainly wouldn't rob somebody that he knew and who knew or that he was known to that person.

It's my opinion that Mr. Maddox is confused. He indicated to you that he had worked that day tending bar and that night he hadn't had anything to drink and, of course, you can evaluate that. And he also indicated that he was going to bed at 8:15, evaluate that, and the circumstances just don't add up. No motive has been shown why Michael Taylor would commit this offense.

You haven't heard any police officers come in today and testify that they arrested Mike Taylor and they found him to be in possession of any wallet or keys or papers belonging to this complaining witness, no testimony that any search of his premises produced any of these things that were taken from Mr. Maddox. There really has been nothing that Mr. Maddox thinking that Mike Taylor was the one that knocked him down, that has us here today and I question, very seriously question that testimony and I believe if you watched the witnesses, watched their demeanor and have the opportunity to evaluate them that you too will have some doubt about that.

Now, you've been given the instructions. As I indicated to you in the voire dire when we talked about the [41] questions and answers at the very beginning, that you all subscribe to the principle of the presumption of innocence, that Michael Taylor is presumed innocent—and I believe he is innocent—that that presumption remains with him throughout the trial. He has no burden to put on any proof and it is the, it's the obligation and responsibility of the Commonwealth to prove his guilt beyond a reasonable doubt.

Now, what is reasonable doubt? Well, I believe reasonable doubt is if you've heard one side of the testimony and you say well, I think that testimony is believable, the Commonwealth's testimony. Then you hear the defense testimony, the defendant testify and after the defendant gets off the stand you say I watched that fellow, I heard what he had to say and I don't, I just don't believe he's the one that did this thing.

Well, if you come to that impasse where you've got, where you believe the defendant equally as well as you do the prosecuting witness that's reasonable

doubt. That's taking that Principle and applying it on a very basic level. That's the level that we have here.

I think that if you carefully evaluate the witnesses that you will believe as I do, that Michael Taylor is innocent of this charge, that Michael Taylor is not one of these two people that were down there on this evening and that there has not been evidence sufficient enough to warrant conviction of Michael Taylor, let alone to sentence him to five or ten years confinement [42] in the penitentiary. I do not believe that that evidence has been Presented and I feel in my heart that you all believe that also. Therefore, I ask on behalf of Mike Taylor that you do render a verdict of not guilty and that you require more of the Commonwealth and that you set him free to go back to his parents, go back to his way of life.

Thank you.

The COURT. Mr. Corns.

Mr. CORNS. May it please the Court, Mr. Judy, ladies and gentlemen. On behalf of the prosecution and I'm sure the Court, I want to thank each of you for serving today in this capacity. We're most grateful.

I never want to close my Commonwealth case without assuring each juror that I don't have anything personal against the defendant who is on trial and that is certainly true in this case. I never even knew this defendant until I was Commonwealth's attorney. So the remarks I make are not made because I have any ill will against this defendant but because I believe that the evidence clearly shows a serious crime has been committed and that this defendant has got to pay for that crime.

Before I talk with you further about the evidence let me mention a few things Mr. Judy has brought to your attention. First of all, reasonable doubt. This defendant, like every other defendant who's ever been tried who's in the penitentiary or in the reformatory today, has this presumption of innocence until [43] proven guilty beyond a reasonable doubt. That's just a presumption on his behalf and if you will look at the instruction that the Court gave you as to what reasonable doubt is, I think you will conclude the Commonwealth has far in excess proved beyond a reasonable doubt, without a question, this defendant committed the crime with which he's charged. Notice how the Court has defined for you in the instruction the term 'reasonable doubt', means a substantial doubt, a real doubt, in that you must ask yourself not whether a better case might have been proved but whether after hearing all the evidence you actually doubt that the defendant is guilty.

Secondly, Mr. Judy has said where is the wallet. Well, this defendant is sharp enough he knows to get rid of the wallet and the things of that nature. You don't keep evidence of a crime around. One of the first things defendants do after they rip someone off, they get rid of the evidence as fast and as quickly as they can.

This is merely a case of contrast in a large sense. You have a very youthful defendant and a gentleman who is the complaining witness two and a half times his age. You have one who pays for what he gets; the other who takes what he wants. You have one who respects the law and who works at it six days a week; you have another one who has no respect for the law.

In the language of the day this is what we would rall a rip off. Mr. Maddox was ripped off by this defendant. [44] Sometimes it's hard to visualize how the crime occurred sitting in here in the courtroom. You're not down there when this fellow gets struck in the head and knocked on the floor and his other companion jump upon him and hold him and he got his key out of his front pocket and then ripped his billfold out of his back pocket. Sometimes we forget how ugly and how horrible a crime is so don't kid yourself. Mr. Maddox was rolled. He was ripped off by this defendant but they like to come into court and play on your sympathy. They don't want you to make your mind go back to the crime and to those events that took place. They want you to look at them and say well, I wouldn't do anything like that, you just know I wouldn't.

This defendant had the three basic prerequisites which a criminal desires. He had time, he had the opportunity and he had the motive. What was the motive? Money. He was working part time over here at Spencer's Cafe cleaning up for just a few dollars a week but he thought Mr. Maddox would be an easy touch. He's down there living alone, he's got his buddy with him and they'll just roll him with no other witnesses. And that's why they had no other witnesses. He chose the time, he chose the place so there wouldn't be any other witnesses.

I think the best way that you might judge the case is just ask yourself this question. Who is telling me the truth? It's neither Mr. Judy or I who is on trial. It's this gentleman who's on trial and you've got to decide which one is telling the [45] truth. None of us were there. Who is the one who would have the least

interest in telling you anything but the troth, Who is the one who would be most likely to tell you the truth? Mr. Maddox. What would he gain by making a charge against this defendant? What would he gain by coming to court? Nothing, except he wants to be protected from people like this defendant. He says I have a right to be protected, I'm willing to get involved and we're living in a day and time that so many people don't want to get involved. But he's willing to come in here and tell you what happened. What reason would he have to tell you other than the truth. Did he indicate to you he's a man of vengeance, a man who wants to get revenge? I don't think so.

Now, look at this defendant. What reason would he have to tell you the truth? Not any because he knows if he tells you what he did you're going to give him what he deserves, a trip to the penitentiary. That's exactly what he's earned.

Now, look at his story. He lives with his mother and step father. He says on that day he was sick, he was so sick he had to go to bed at 2:00 and stayed there until 7:00. Did you hear his mother or his step father come in and testify he was home sleeping. I wonder why they didn't. That would be the first thing you would do. They usually if at all possible bring in their relatives to testify on their behalf. I submit that's because he wasn't home in bed sleeping till 7:00 that evening. Even assuming he was, he said I was sick a sick man, so sick I [46] had to go to bed for five hours, take a medication. Does a sick man get up out of a sick bed at 7:00 and go out and sit in a car until 2 A.M. in the morning? Ask yourself that question. Do you believe that? If you do, he's entitled to be set free. That's a long time, seven to 2 A.M. That's seven hours sitting in a car that won't run. What's he doing out there for seven hours? Ask

yourself that question. And how many people did he say were in the car with him that night? Four other people. How many did he bring in here today to tell you they were with him? Where are they? There's not a one of them here, is there? Don't you know if they were with him and he was out there he would have the whole group in here but you didn't hear a one, for the simple reason he wasn't out there. He was with this other fellow and he ripped off Mr. Maddox and took his money, his papers and his keys. They were out on the town with what little money they got.

I always make a recommendation to the jury and I always tell them that I never try to tell them what to do. I only share my thoughts and my opinions with you and it's up to you to decide what punishment you will give out to the defendant. I think this defendant has earned the maximum period of ten years but that's up to you to decide. And I want to tell you why.

First of all, he took this man's wallet. Now, it only contained ten to fifteen dollars. Now, when you first look at that that doesn't seem like much money. If it were 150 or $1500.00 it would seem like a much more serious crime but to this [47] man here who has a very limited education and a very limited income, ten to fifteen dollars is a lot of money and I've been in that situation where that's all I had and if that's all you've got and they take it from you, you've suffered a terrible loss. If you'll recall from the Bible the widow who gave her life gave more than all the other people who brought in storehouses of treasures because she gave in accordance with her income. This man lost and they took all he had. Of course, they didn't know how much he had at the time. They hoped it was more but whatever

it was they took it and they made him pay, so don't kid yourself.

Not only did he take his billfold and his money but he took his papers. There's nothing more frustrating to people than to have someone steal their personal papers, their Social Security card, your birth records, your birth certificate which he said was in his wallet, his rent receipt. These are things which are of inestimable value and not only did they take his money and his wallet and his papers, they took what I think is a person's most important possession today, his house key. Now, I submit although it's small in size there is nothing more important to you than the key to your own house, whether you've got the best house in the county over here on the hill or whether you live in the project, over here in the project, when someone else steals your key they've got the access to come and go in your house. So I think this defendant has earned the maximum of ten years and I'm asking you to consider that.

[48] In closing, he's got a very simple philosophy. This defendant says what's mine is mine; I will keep it. What's yours is mine; I will take it. That's not only his philosophy, that's what he practices. That's what he did and Mr. Maddox is saying to you please afford me the same protection of the law that everyone else is accorded.

The COURT. Ladies and gentlemen, you will now retire to the jury room to make your verdict. The Sheriff will deliver the instructions to you.

[Whereupon, the jury retired to the jury room and after deliberation, the following was heard in open Court:]

The COURT. Has the jury reached a verdict?

Mr. SANDERS. Yes, sir.

The COURT. Will you read the verdict, please?

Mr. Sanders. We the jury find the defendant guilty under instruction number one and fix his punishment at five years in the penitentiary.

The Court. That is the verdict of each and all of you ladies and gentlemen? You wish to have the jury polled, Mr. Judy?

Mr. Judy. No, Your Honor.

The Court. Hand the verdict up, please, Mr. Sheriff. [49] Mr. Judy. Comes the defendant and pursuant to leave of Court, files with the Court Reporter the tendered instructions two, three, four and five which the Court considered and refused to give as the law of this case and instead gave the instructions submitted to the Court by the Commonwealth, to which the defendant objected. The defendant objects to the instructions as given by the Court in that they did not totally set forth the law of the case and provide the jury with the appropriate instructions with which they could render a verdict consistent with the evidence.

The court did not give instruction number two as tendered by the defendant and the defendant states that it is proper and was proper for the Court to give this instruction because under the evidence of the case, the Court could have found the defendant guilty under this instruction and sentenced him to twelve (12) months in jail and a fine not to exceed $500.00.

The defendant objects to the failure to give instruction number three with regard to reasonable doubt as set forth in the tendered instructions as being the proper instruction which should have been given in order to advise the jury that there are degrees of the offense which they could have considered and that they could have found him guilty upon a lower degree than that which they returned a verdict of guilty for.

The defendant objects to the Court's failure to give tendered instruction number four which instructs the jury that the defendant is presumed to be innocent of the crime and that he starts the trial with a clean slate and no evidence against [49a] him and that this presumption of innocence alone is sufficient to acquit the defendaat. The Court in none of its other instructions so charges the jury with this very basic and fundamental principle of judicial fair play. It was error for the Court to refuse to give this instruction and the failure to do so was prejudicial to the defendant.

The defendant objects to the failure of the Court to give tendered instruction number five which provides an instruction to the jury that the indictment which was read into evidence is in no way any evidence against the defendant and that no adverse inference can be drawn against the defendant from a finding of the indictment. The defendant states that the failure of the Court to so instruct the jury is prejudicial against the defendant because the jury is left free to consider the indictment as probative evidence just as any other evidence which they heard during the trial of this action and unless the jury is instructed that the indictment has no probative force and carries no implication of guilt then the jury is left free to consider this evidence as it considers all other evidence which it received in the trial of this case.

* * * * *

INSTRUCTION No. 2

[Tendered by Defendant]

If you do not find the defendant guilty under Instruction No. , you will find him guilty under

this instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

(a) That in this county or on about February 16, 1976, and before the finding of the indictment herein, he took a wallet belonging to James Maddox of Frankfort, Kentucky, containing $10.00 to $15.00 and his house key;

(b) That in so doing he intended to deprive James Maddox of his wallet containing $10.00 to $15.00 and his house key;

AND

(c) That he knew the wallet and house key was the property of someone other than himself.

If you find the defendant guilty under this Instruction, you will fix his punishment as confinement in the County Jail for a period not to exceed twelve (12) months, at a fine not to exceed $500.00, or at both confinement and fine, in your discretion.

The word "Deprive" as used in this Instruction means to withhold property of another permanently or for so extended a period as to appropriate a major portion of its economic value or with intent to restore only upon payment of reward or other like compensation or to dispose of the property so as to make it unlikely that the owner will recover it.

INSTRUCTION No. 3

[Tendered by Defendant]

If upon the whole case you have a reasonable doubt as to the defendant's guilt, you shall find him not guilty. If you find him guilty, but have a reasonable doubt as to the degree of the offense of which he is

guilty, you shall find him guilty of the lower degree. (The term "reasonable doubt" as used in these instructions means a substantial doubt, a real doubt, and that you must ask yourself not whether a better case might have been proved, but whether, having hearing all of the evidence, you actually doubt that the defendant is guilty.)

INSTRUCTION No. 4

[Tendered by Defendant]

The law presumes a defendant to be innocent of a crime. Thus a defendant, although accused, begins the trial with a "clean slate". That is, with no evidence against him. The law permits nothing but legal evidence presented before a jury to be considered in support of any charge against the accused. So the presumption of innocence alone is sufficient to acquit a defendant, unless you are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all of the evidence in the case.

INSTRUCTION No. 5

[Tendered by Defendant]

The jury is instructed that an indictment is in no way any evidence against the defendant and no adverse inference can be drawn against the defendant from a finding of the indictment. The indictment is merely a written accusation charging the defendant with the commission of a crime. It has no probative force and carries with it no implication of guilt.

[Opinion rendered: April 1, 1977]

[To be published]

COURT OF APPEALS OF KENTUCKY

No. CA-152-MR

MICHAEL TAYLOR, APPELLANT

v.

COMMONWEALTH OF KENTUCKY, APPELLEE

Appeal from Franklin Circuit Court,
Honorable Henry Meigs, Judge,
Criminal Action No. 7844

Affirming in Part; Reversing in Part

Before HAYES, HOWARD, and WILHOIT, *Judges*

HOWARD, *Judge*: Michael Taylor was convicted by a Franklin Circuit Court jury of violating *Ky. Rev. Stat.* Ch. 515.030 (hereinafter KRS), to wit second degree robbery. Evidence was presented that Taylor along with an accomplice went twice to the home of James Maddox on the evening of February 16, 1976. On the second visit when Maddox again would not allow them to enter his home, Taylor hit him and took his wallet and house key. Taylor and Maddox were the only witnesses to testify at the trial. Maddox testified that he had known Taylor for approximately 15 years and was certain he was the person who robbed him. The appellant denied the robbery testifying that he was in a parked automobile with three other persons the entire evening.

Defense counsel tendered and requested that an instruction on presumption of innocence be given to the jury. The trial court refused the request, but gave an instruction on reasonable doubt. The appellant contends that he was substantially prejudiced by the trial court's failure to instruct on presumption of innocence. We find no evidence to support this contention. The well established law of Kentucky has been that as long as the trial court instructs the jury on reasonable doubt an instruction on the presumption of innocence is not necessary. *Mink* v. *Commonwealth*, 228 Ky. 674, 15 S.W. 2d 463 (1926); *Swango* v. *Commonwealth*, 291 Ky. 690, 165 S.W. 2d 182 (1942). We find no reason to change the established law on this point.

The second error appellant asserts on appeal is that he was substantially prejudiced by the trial court's failure to instruct on the indictment's lack of evidentiary value. We find no merit in the appellant's argument that failure to give such an instruction denies the defendant due process of the law.

In his closing argument the prosecutor made reference to facts which had not been placed into evidence concerning the defendant's character. While the Kentucky court has held in several cases that such remarks are improper and allowed reversal of the case on that point, the defendant failed to object to these remarks thus not preserving them for appellate review. *Lynch* v. *Commonwealth*, Ky., 472 S.W. 2d 263 (1971). We do not feel that the statements meet the standard of prejudice of being so apparent and great as to result in a manifest injustice as set forth in *Ferguson* v. *Commonwealth*, Ky., 512 S.W. 2d 501 (1974) and *Futrell* v. *Commonwealth*, Ky., 437 S.W.

2d 487 (1969), to allow reversal on the impropriety in the argument despite defendant's failure to object at the proper time.

The appellant contends that no presentencing investigation was made in his case as required by KRS 532.050 before he was sentenced nor was the question of probation or conditional discharge as provided in KRS 533.010 considered. It appears after examining the record that these allegations are correct. The recent Supreme Court case of *Brewer* v. *Commonwealth*, Ky., —— S.W. 2d —— (Jan. 14, 1977) (24 Ky. Law Summary 1) held that the requirements of KRS 532.050 are mandatory and not within the discretion of the trial court judge. In regard to KRS 533.010 the Supreme Court in *Brewer, supra* stated that this determination by the court is discretionary rather than mandatory but stated that the statute requires that probation or conditional discharge be given consideration.

Therefore, we find no error in the verdict of the jury, but we do find error in the trial court's sentencing procedure. On the latter point, this case is reversed with directions to the Franklin Circuit Court to take appropriate action consistent with this opinion.

Judge HAYES concurring. Judge WILHOIT dissenting.

Attorney for the Appellant: *Hon. J. Vincent Aprile, II*, Assistant Deputy Public Defender, 625 Leawood Drive, Frankfort, KY 40601.

Attorney for the Appellee: *Hon. Guy C. Shearer*, Assistant Attorney General, Capitol Building, Frankfort, KY 40601.

COURT OF APPEALS OF KENTUCKY

CA–152–MR

MICHAEL TAYLOR, APPELLANT
v.
COMMONWEALTH OF KENTUCKY, APPELLEE

Appeal from Franklin Circuit Court,
Honorable Henry Meigs, Judge,
Indictment No. 7844

Dissenting

WILHOIT, *Judge:* I respectfully dissent from so much of the opinion of the majority as holds that an instruction on the presumption of innocence when requested need not be given by the court because the instruction on reasonable doubt suffices. It strikes me as bordering on the fatuous to say that a jury must be instructed on one of the most basic principles of our criminal law but not the other. The reason given for this anomaly in Kentucky jurisprudence has heretofore been that an instruction on the presumption of innocence is "too favorable to the defendant", *Swango* v. *Commonwealth,* 291 Ky. 690, 165 S.W. 2d 185 (1942). Most of those rights embodied in the modern concept of due process are "favorable to the defendant", but that is their very reason for existence. Not every person charged in a criminal complaint or indicted by a grand jury is guilty of a crime. In recognition of this, our system has built in certain safeguards to protect the innocent. One of these safeguards is the so-called

presumption of innocence of a criminal defendant. There is certainly no such presumption in the minds of jurors about to try a case. In fact, by the time the indictment is read to the jurors, the opposite presumption is likely to be present in their minds. The law builds in the presumption of innocence, but it is of no use to the defendant if the jury is never told about it.

While an instruction on reasonable doubt does much the same thing that one on the presumption of innocence would do, I believe there is a subtle distinction between the two and one does not completely perform the job of the other. As pointed out by Wigmore, the concept of presumption of innocence "cautions the jury to put away from their minds all of the suspicion that arises from the arrest, the indictment, and the arraignment and to reach their conclusion solely from the legal evidence adduced." He further points out that this caution is "indeed particularly needed in criminal cases". IX J. Wigmore, *Evidence* § 2511 (3d ed. 1940).

I believe the Supreme Court of Kentucky would now reject the old line of cases relied upon by the majority.

Attorney for Appellant: *J. Vincent Aprile, II*, Ass't Public Defender, 625 Leawood Drive, Frankfort. Ky. 40601.

Attorney for Appellee: *Guy C. Shearer*, Ass't Attorney General, Capitol Building, Frankfort, Ky. 40601.

SUPREME COURT OF KENTUCKY
SC-249-D

MICHAEL TAYLOR — MOVANT

V.

COMMONWEALTH OF KENTUCKY — RESPONDENT

ORDER DENYING MOTION TO SUPPLEMENT RECORD AND ORDER DENYING DISCRETIONARY REVIEW

The motion of the Commonwealth of Kentucky that it be permitted to supplement the record in this proceeding is denied.

The motion of Michael Taylor for a review of the decision of the Court of Appeals is denied, and the decision stands affirmed.

ENTERED June 29, 1977.

Lott Reed
Chief Justice

COMMONWEALTH OF KENTUCKY

FILED

JUL 13 1977

JAMES E. COLLINS
CLERK FRANKLIN CIRCUIT COURT

Court of Appeals

MANDATE

MICHAEL TAYLOR

vs. File No. CA-152-MR
Opinion Rendered APRIL 1, 1977
Appeal From FRANKLIN
Circuit Court Action No. IND. #7844

COMMONWEALTH OF KENTUCKY

The Court being sufficiently advised, it seems the judgment herein is erroneous, in part.

It is therefore considered that the judgment be affirmed in part and reversed in part with directions to correct the judgment in conformity with the views expressed in the opinion herein; which is ordered to be certified to said court.

JUNE 29, 1977 - Movant's Discretionary Review denied by the Supreme Court

A Copy - Attest:

Issued July 11, 1977

JOHN C. SCOTT, CLERK

CA-7

Supreme Court of the United States

No. 77–5549

MICHAEL TAYLOR, PETITIONER

v.

KENTUCKY

ON PETITION FOR WRIT OF CERTIORARI to the Court of Appeals of the State of Kentucky.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

[November 28, 1977.]

Mr. Justice Blackmun took no part in the consideration or decision of this petition.

U. S. GOVERNMENT PRINTING OFFICE : 1978 O - 253-168

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-5549

MICHAEL TAYLOR,
PETITIONER

V.

COMMONWEALTH OF KENTUCKY,
RESPONDENT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

ROBERT F. STEPHENS
ATTORNEY GENERAL

GUY C. SHEARER
ASSISTANT ATTORNEY GENERAL
CAPITOL BUILDING
FRANKFORT, KENTUCKY 40601

COUNSEL FOR RESPONDENT

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO.

MICHAEL TAYLOR,
Petitioner

V.

COMMONWEALTH OF KENTUCKY,
Respondent

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

TO THE COURT OF APPEALS OF KENTUCKY

The petitioner, Michael Taylor, has in his petition requested that a writ of certiorari issue to review the judgment of the Court of Appeals of Kentucky entered on July 11, 1977.

The petitioner was indicted, (Indictment No. 7844), and tried in the Franklin Circuit Court, Franklin County, Kentucky, on the charge of second degree robbery in violation of KRS 515.030. He was found guilty by the trial jury which fixed his punishment at five years in the penitentiary. (Transcript of Evidence, hereinafter designated as TE pp.7,8).

The opinion of the Court of Appeals of Kentucky affirming petitioner's conviction was filed on April 1, 1977 and is reported as Taylor v. Commonwealth, Ky., App. 551 S.W. 2d 813 (1977). The order of the Supreme Court of Kentucky denying discretionary review in petitioner's case was entered on June 29, 1977. The mandate in petitioner's case was entered by the Court of Appeals of Kentucky on July 11, 1977. Copies of the above-mentioned opinion, order and mandate are attached hereto.

JURISDICTION

The opinion of the Court of Appeals of Kentucky was entered on April 1, 1977. Petitioner's motion for discretionary review in the Supreme Court of Kentucky was denied on June 29, 1977. The mandate of the Court of Appeals of Kentucky was issued in petitioner's case on July 11, 1977. Petitioner states the jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3).

QUESTIONS PRESENTED BY PETITIONER

I.

WHETHER PETITIONER WAS UNCONSTITUTIONALLY DEPRIVED OF HIS RIGHT TO DUE PROCESS OF LAW BY THE REFUSAL OF THE TRIAL COURT TO GIVE AN INSTRUCTION ON THE PRESUMPTION OF INNOCENCE WHEN PETITIONER'S COUNSEL REQUESTED AND TENDERED SUCH AN INSTRUCTION?

II.

WHETHER PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHT TO DUE PROCESS BY THE REFUSAL OF THE TRIAL COURT TO GIVE AN INSTRUCTION ON THE INDICTMENT'S LACK OF EVIDENTIARY VALUE WHEN PETITIONER'S COUNSEL REQUESTED AND TENDERED SUCH AN INSTRUCTION?

CONSTITUTIONAL QUESTION INVOLVED

Petitioner alleges the constitutional provision involved is the 14th Amendment to the Federal Constitution.

COUNTERSTATEMENT OF THE CASE

Petitioner, Michael Taylor, was tried in the Circuit Court of Franklin County in Frankfort, Kentucky on the charge of second degree robbery in violation of Kentucky Revised Statute (KRS) 515.030. Contrary to his plea, petitioner was convicted by a jury of the charged offense and sentenced to five years confinement in the penitentiary. Final judgment was entered against petitioner on June 22, 1976. Notice of appeal was filed on June 24, 1976.

On April 1, 1977 the Kentucky Court of Appeals in a published opinion, with one judge dissenting, affirmed the conviction in petitioner's case, but remanded the case to the trial court for a resentencing due to the trial judge's failure to order the statutorily mandatory presentencing investigation. The trial judge had ordered, received and had the report in his office in his desk at the time petitioner was first sentenced but the court order book did not state this fact. Hence, the case was remanded back to the circuit court where the petitioner was resentenced in conformity with the Court of Appeals' order and opinion.

Petitioner's timely motion for discretionary review was overruled by the Supreme Court of Kentucky on June 29, 1977. Consequently, the Court of Appeals of Kentucky on July 11, 1977 issued the mandate in petitioner's case.

In March of 1976, petitioner was indicted in the Franklin Circuit Court by Indictment No. 7844, for the offense of second degree robbery in violation of KRS 515.030 (Transcript of Record hereinafter designated TR p.3; TE p.14). According to the

indictment, petitioner on or about February 16, 1976, committed second degree robbery "when, in the course of committing theft, he used physical force upon James Maddox" and "unlawfully took from Mr. Maddox a wallet containing ten ($10) to fifteen ($15) dollars and his house key." (TR p.3).

James Maddox, the robbery victim lived at 349 Rosewood Drive, Frankfort, in Franklin County, Kentucky, on the 16th of February, 1976, the day the robbery occurred. He had lived at the address 16 or 17 years (TE p.17). Mr. Maddox was "going on fifty-one years of age and had been employed at the George Taylor Liquor Store on Broadway for about ten or twelve years" (TE p.17). He grossed about eighty dollars a week as salary and had known Michael Taylor "about fifteen years"(TE p.17). However, over the years Taylor had never been over to the Maddox house but about three times before February 16, 1976. (TE p.18).

It was about 8:15 p.m. the night of February 16, 1976 when Michael Taylor, age 20 years, came to James Maddox's home and knocked on the door. (TE p.18). Maddox opened the door and Michael Taylor said, "let us in." (TE p.18). Maddox informed Taylor that he had "to go to bed" since he had "to get up early the next morning" and "go back to work," the next morning. (TE p.18). Taylor said, "okay and he and a companion left." (TE p.18).

Taylor and his companion came back about fifteen minutes later and knocked on the door again and Taylor said, "you ain't going to bed" and they "pushed their way in" when Maddox opened the door (TE pp.18,19). Maddox again told them he had to go to bed and ordered them "to get out of his house" and threatened to call the police. (TE p.19). As Maddox stepped out of the door Taylor's companion "jumped on Maddox's back and Mike Taylor

hit him in the side of the head." (TE pp. 19-20). Petitioner wrestled Maddox to the ground and then wrestled for and with Maddox's pocketbook and got the pocketbook out and then got Maddox's key and broke off running. (TE p.19). Maddox identified Taylor in the Courtroom and stated that there was between ten and fifteen dollars in the wallet that was taken, also other papers, a bus ticket, rent receipt and social security card. (TE pp.19-20). None of the items taken were ever returned to Maddox (TE p.20).

Maddox's work at the liquor store consisted of selling beer and whiskey and bartending (TE p.22). James Maddox the robbery victim was the only witness called by the Commonwealth. He was positive that Mike Taylor got him down and took his wallet (TE pp.24-25). Maddox subsequently took out a warrant against Taylor (TE p.20).

Michael "Mike" Wayne Taylor, age 20, denied robbing James Maddox in his testimony (TE pp.26-35). He did however, admit that he had been at Maddox's home but denied being there on February 16, 1976. Petitioner-Taylor admitted that most of Maddox testimony was true but denied that he robbed Maddox. (TE pp.34-35). Taylor was the only witness to testify in his behalf.

Petitioner testified that he had not committed the acts which Mr. Maddox had related on the witness stand (TE p.27). Furthermore, petitioner asserted that he had never struck Mr. Maddox. (TE p.27).

Petitioner testified that he had known Mr. Maddox "about three or four years" and had been to his house "several times." (TE p.27).

Petitioner, the only defense witness, explained that he was twenty years of age and that he resided with his mother and stepfather in Frankfort (TE p.26). He was employed at George's restaurant and had been for six years. (TE pp.25-26).

After the robbery occurred, Mr. Maddox immediately called the police and reported the offense. The prosecutor elicited from Mr. Maddox that he had subsequently taken out a warrant against the petitioner and "appeared before the Franklin County Grand Jury to seek an indictment." (TE p.20).

At the conclusion of the direct examination, Mr. Maddox explained that he did not know the other person who was with petitioner on the night in question (TE p.21). The witness-victim had never seen the other person before and had seen him but one time since.

After the Maddox testimony was completed, the defense rested (TE p.36). Petitioner's counsel then made his motion for a directed verdict, but was overruled. (TE p.36).

During an in-chambers hearing on the instructions, petitioner objected to the trial court's failure to give the jury the instructions tendered by the defense (TE p.36). Petitioner's counsel requested instructions, including instructions on the presumption of innocense, Question I presented herein, (Defense Instruction No.4) and on the indictment's lack of evidentiary value, Question 2 presented herein, (Defense Instruction No.5). Parenthetically, it should be noted that these instructions are contained as appendices to the transcript of evidence (TE p.49). During the in camera hearing on instructions, petitioner's counsel obtained leave of the court to dictate into the record at the conclusion of the trial the defense's formal objection pertinent to the instructions (TE pp.36-37).

ARGUMENT

I.

THE COURT BELOW DID NOT ERR TO APPELLANT'S SUBSTANTIAL PREJUDICE AND DENY APPELLANT DUE PROCESS OF LAW BY REFUSING TO GIVE THE DEFENSE REQUESTED INSTRUCTION ON THE PRESUMPTION OF INNOCENCE.

After the jury was selected in the instant case, the Commonwealth's Attorney, Honorable Ray Corns, presented his opening statement and he concluded by reading the indictments to the jury (TE pp.13-14). It was the Court that directed Mr. Corns to read the indictment.

In Kentucky the Court generally has the clerk of the court read the indictment to enlighten the select jury as to the charge that is to be heard by the jury. The record does not disclose whether or not the clerk was present when the indictment was read.

It is generally well understood in Kentucky that an indictment is merely a piece of paper upon which is typed a stated law violation of which the accused may or may not be guilty.

The jurors were or are well aware that it was or is their responsibility to determine whether or not the accused is guilty or innocent of the typed charge in the defendant's case.

In the case of Baker v. Commonwealth, Ky. App. 134 S.W. 2d 997, at page 999, (1940) the Court determined that where the usual instruction on reasonable doubt was given, that the accused was presumed to be innocent of every charge named in the indictment until his guilt had been established by the evidence beyond a reasonable doubt, should have been omitted. Also, in Johnson v. Commonwealth, Ky.App. 181 S.W. 2d 262,263, 297 Ky. 760 (1944) the Court said:

> "The final contention is that error was committed in failing to instruct that the law presumes the defendant innocent until his guilt has been proven beyond a reasonable doubt. In Mink v. Commonwealth, 228 Ky. 674, 15 S.W. 2d 463, we held that the usual instruction on reasonable doubt was sufficient and that an instruction of this character is not required. The usual reasonable doubt instruction was given."

The appellant's counsel from the very beginning of the voir dire examination of the jurors in the case to the conclusion of the court's presentation of the instructions and the return of the jury's verdict repeatedly stressed that the presumption of innocence continued to follow the appellant throughout the proceedings and at no time did the prosecutor contend otherwise. Appellant's counsel tendered the four instructions appearing on unnumbered pages 51-54 inclusive of the Transcript of Evidence. Appellant's tendered instruction No.4 dealt specifically with the "presumption of innovence" and "reasonable doubt."

The court's instructions No.1 and 2 both stressed that in order to find the defendant guilty of the offense charged that the jury must believe the defendant guilty beyond a reasonable doubt and court instruction No.2 defines reasonable doubt.(TE p.37).

The appellant admits in his Brief that in the past the Kentucky Court of Appeals in the following case decisions approved the circuit court refusal to give a specific instruction on presumption of innocence in addition to its instructions on reasonable doubt. The case decisions upholding the court of a specific presumption of innocence instruction refusal are: Brown v Commonwealth, 198 Ky.663, 249 S.W. 777 (1923), and Mink v. Commonwealth, 228 Ky. 674, 15 S.W. 2d 463 (1929). In Baker v. Commonwealth, 281 Ky. 45, 134 S.W. 2d 997 (1939), the Kentucky appellate court reasoned that a presumption of innocence instruction was not proper because the trial court had instructed on reasonable doubt.

The trial jury in the case at bar did not lack for sufficient knowlege that the presumption of innocence continued with the accused on trial until it was over come by the evidence presented in court. The matter was brought up during the voir dire examination of the prospective jurors by appellant's counsel. The following examination in the voir dire proceedings appear on Pages 9 and 10 of the Franklin Circuit Court's Transcript of Evidence:

> "Have any of you heard or know anything about this particular case? Have any of you ever had occasion or the necessity to take out a warrant or to institute criminal proceedings before? I take it by your silence that you haven't. I'm sure you all agree to this final question as regards the principle of innocence or reasonable doubt. Do each of you all agree and understand that Mike Taylor as he sits there today is a young man who is presumed to be innocent of the charge of second degree robbery, that this innocence has to be overcome by the Commonwealth to meet a standard of what we call beyond a reasonable doubt and that to return a verdict of not guilty. Do each of you understand the principle of innocence the requirement of reasonable doubt? That reasonable doubt must be removed in order to fina a verdict of guilty? Do each of you understand that principle and I try to make it as elementary as I can. Lawyers sometimes have a tendency to make things complicated but I hope I make it sufficiently clear." (TE p.9).
>
> I take it by your silence that each of you does understand. Thank you." (TE p.10).

THE COURT:

Take your list.

MR. CORNS: Commonwealth takes the jury, Your Honor.

THE COURT: Take your list, Mr. Judy.

MR. JUDY: Thank you, Your Honor. We'd like to deliberate for just a moment if we could.

THE SHERIFF: Gus Smith, Christine Noblitt are excused.

THE COURT: Call two more jurors.

(Whereupon, Mr. William Sanders and Nancy Forsee were sworn by the Court).

MR. CORNS: These questions will be directed to the last two members that have just joined the panel.

Have you eard (sic) the questions I asked previously?

MR. SANDERS: Yes, sir.

MS. FORSEE: Yes, sir.

MR. CORNS: Having heard those questions do you know of any reason why either of you could not serve or should not serve as a juror? Mr. Judy, when he talked to the jurors, advised that each defendant is presumed innocent until proven guilty beyond a reasonable doubt. If you serve in this case will you follow that rule of law? If, however, the Commonwealth does prove to your satisfaction beyond a reasonable doubt that this defendant did commit the crime with which he's charged, will you return a verdict of guilty? Do you know of any reason why, if you return a verdict of guilty, you could not fix his punishment between five and ten years in prison for second degree robbery? If both of you serve will you give both the prosecution and the defense a fair trial? Commonwealth passes, Your Honor.

MR. JUDY: May it please the Court, Mr. Corns. I also direct my attention to the last two who came on. You all were sitting in the back. Could you hear the questions that I generally asked? Was there any question that I asked that you might have registered a reply in your mind that you would have answered if you had been sitting on the panel at that time? Do either of you know socially or have you been represented by Mr. Corns or Mr. Prewitt? Have either of you had the opportunity to take out a warrant initiating an action in court? Do both of you subscribe to the principle of law and the Judge will instruct you that the defendant is presumed innocent until proven guilty with sufficient proof to prove beyond a reasonable doubt for you to return a verdict of guilty? Do both of recognize that it is equally a part of your duty as a juror to return a verdict of not guilty if you believe or have reasonable doubt

and that your duty is just as well served in returning a verdict of not guilty if you so believe as a guilty verdict if you believe he's guilty beyond a reasonable doubt? Thank You.

THE COURT: Take your licks, Mr. Corns.

MR. CORNS: Commonwealth takes the jury, Your Honor.

THE COURT: Commonwealth accepts the jury.

MR. JUDY: Defendant accepts the jury, Your Honor.

The foregoing examination was heard by all accepted jurors. Hence, it is apparent from the foregoing pages of the transcript of evidence that the prospective and accepted jurors were informed and interrogated more in the voir dire examination on the presumption of innovence and reasonable doubt than on anything else. The trial jury was most adequately informed and enlightened on the presumption of innocence by the voir dire interrogation, by Mr. Judy, counsel for the appellant and also by Mr. Ray Corns, counsel for the Commonwealth. The court was no doubt cognizant of this fact when it refused to give Instruction No. 4 tendered by the so-called "clean slate" presumption of innocence instruction tendered by appellant's counsel. (TE p.54).

The court's refusal was not (1) an error on the court's part, and (2) if it had been or was error on the part of the court for the reasons, facts and in the setting set forth above it was harmless error.

Any form of specific presumption of innocence instruction by the court would have meant that the jury was being instructed on a presumption, or, on that which was already well known from their voir dire examination. The appellant certainly did not stand trial before a jury which was uninformed or lacking in knowledge as to the constant applicability of the presumption of innocence until the accused was proven "guilty" beyond a reasonable doubt.

The Instruction No. 4 submitted to the court for presentation to the jury is in part an argumentative self servi statement and a quasi testimonial for the accused as to appella alleged or claimed clean slate in that it attempts to limit or the jury what is to be considered in arriving at its findings o fact and verdict. In Kentucky only felony convictions are admissible in evidence in attacking the witnesses' credibility. The term "clean slate" would have inferred a clean record as to felonies and misdemeanors.

In view of the testimony transcript of the record the appellant received a fair trial within the meaning of the Fourt Amendment and within the ruling of W.J. Estelle, Jr., v. Harry Lee Williams, 48 L.Ed. 126, 96 S.Ct. (No. 740676) argued Octobe 1975, Decided May 3, 1976 and cited by the appellant. The Este supra case turned on the question of compelling the accused defendant to wear identifiable prison clothing at his trial in it was held that the accused was denied equal protection of the laws, etc. The defendant Estelle, Jr. voiced his objection to the jailer before he was taken to the courtroom. The Estelle case is not controlling in the Michael Taylor case. In the givi of instructions the trial court must consider each case and issu in its own factual context as revealed by the evidence and trial record.

In Mink v. Commonwealth, Ky., 15 S.W. 2d 463, 464 [4] (it was stated:

> "It is also suggested that the trial court should have instructed the jury that the defendant was presumed to be innocent until his guilt was shown beyond a reasonable doubt. The usual instruction on reasonable doubt, substantially following the language of

> Section 238 of the Criminal Code, was given, and that was all to which the defendant was entitled. An instruction as to reasonable doubt in substantially the form contended for by appellant was critized in Brown v. Commonwealth, 198 Ky. 663, 249 S.W. 779, and it was there said that the court should not tell the jury that the law presumes the innocence of a defendant, but the instruction should always follow, in substance, the language of the Code. Judgment affirmed."

Also see Johnson v. Commonwealth, Ky., 181 S.W. 2d 262, 297 Ky. 760 (1944); Goodwin v. Commonwealth, Ky., 283 S.W. 420, 214 Ky. 422; Ky.C.L. Key 778 (3)(4); Swango v. Commonwealth, Ky., 165 S.W. 2d 182, 291 Ky. 960 (1942).

Certainly the court's refusal to give tendered instruction No.4 was not an error of constitutional dimension. There was indeed both legal and logical justification for the trial judge's refusing to give tendered instruction No.4.

Appellant's main argument is that such an instruction under the law in some federal courts and other state courts are required under different circumstances. This is true of Coffin v. United States, 156 U.S. 432, 15 S.Ct. 394, 39 L.Ed. 381 (1895) in which the facts and voir dire differ. In Coffin, supra the court stated that the burden of proof had shifed during the course of the trial and that it had become incumbent on the accused to show the lawfulness of their acts. The case is not controlling and applicable to the instant case.

The case of Cockran v. U.S., 157 U.S. 286, 15 S.Ct. 628, 39 L.Ed.704 (1895) was a bank case prosecuted under U.S. Rev. Stat. §5209 which dealt with the making of false entrys, etc. in which the instructions to a jury under the evidence might be expected in the

factual situation to demand a presumption of innocence instruction. Hence, the case is not applicably controlling in this case of Michael Taylor.

The case of Enoch W. Agnew v. United States, 165 U.S. 36, 17 S.Ct. 235, 41 L.Ed. 624 (1897) also dealt with the testimony of a bank cashier in which both the facts and jurisdiction differed from those applicable to those of the instant case.

In Holt v. United States, 218 U.S. 245, 31 S.Ct. 2, 54 L.Ed. 1021 (1 910) a murder case was dealt with in which the Circuit Court of the United States for the Western District of Washington the judgment was affirmed.

The plaintiff alleged that the remarks of counsel amounted to prejudicial error; wrongfully obtained evidence; sufficiency of allegations of place within exclusive federal jurisdiction, as well as instructions, etc.

The case stated that the jurors should decide controversies as they would any important question in their own affairs is good as against a general exception, etc. See Page 1022, headnote #14 pp.1026-1030.

Appellant on page 10 of his brief presents a quotation from United States v. Thaxton, 483 F. 2d 1071, 1073, the two-fold function which the presumption of innocence performs in our criminal process. However, the appellant's brief fails to mention that the Thaxton case at page 1073 states:

> "Mere failure to instruct by use of the customary formula does not constitute reversible error unless the charge given fails to inform the jury of the purpose and functions of the presumption."

The Thaxton case further states at page 1073 that:

> "Although the presumption is one of the strongest rebuttable presumptions known to law, it does not constitute evidence in favor of the accused and it disappears when a verdict of guilty, supported by substantial evidence, is returned against the defendant."

Respondent submits that the court's Instruction No.1, No.2 and No.3 appearing on pages 37 and 38 of the Transcript of Evidence instructing the jury as to reasonable doubt were sufficient. (TE pp.37-38).

The interrogation of the prospective jurors by petitioner's counsel and the prosecutor appearing on pages 10-12 inclusive leaves no doubt but what the trial jury was adequately informed as to presumption of innocence and the doctrine of reasonable doubt.

II.

THE COURT BELOW DID NOT ERR TO APPELLANT'S SUBSTANTIAL PREJUDICE AND DENY APPELLANT DUE PROCESS OF LAW BY REFUSING TO GIVE THE DEFENSE REQUESTED INSTRUCTION ON THE INDICTMENT'S LACK OF EVIDENTIARY VALUE.

Following the swearing of the jury, the trial judge in speaking to the Commonwealth's Attorney said: "Mr. Corns, you may read the indictment and state your case." (TE p.12). At the conclusion of his statement the prosecutor merely read the indictment. (TE p.14).

It is true the court instructed the prosecutor to read the indictment and state his case. The prosecutor stated his case and then read the indictment. It would no doubt have been better had the indictment been read first and the statement read last.

The trial court in the case sub judice followed the law in this Commonwealth of Kentucky and there certainly wasn't any effort to obscure truth. The petitioner had a fair trial and

received the minimum five year sentence. The cases relied upon in petitioner's brief are almost entirely federal cases rather than Commonwealth cases. The petitioner was not denied due process by a failure to stress the presumption of innocence. The jury panel was interrogated about this in the voir dire examination. The interrogation of the jurors plus the reasonable doubt instruction left no doubt as to the trial jury being most adequately informed as to the presumption of innocence and their duties concerning it.

Unlike those things mentioned in Cool v. United States, 409 U.S. 100, 104, 93 S.Ct. 354, 34 L.Ed.2d 335 (1972); Cupp v. Naughton, 414 U.S. 141, 94 S.Ct. 396, 38 L.Ed. 2d 368 (1973) there is nothing in the record, or transcript of evidence in the case sub judice which "conflicts with", "impunges upon","dilutes" , or "negates the presumption of innocence." To the contrary there are repeated questions and answers in the transcript of evidence which repeatedly stress and imbue in the minds of the selected jurors the imperative importance to the petitioner of the doctrine of the "presumption of innocence." The jurors themselves had been adequately interrogated on its importance to the accused petitioner in the process of being selected as jurors. The very beginning of the trial was devoted to ascertaining whether or not the prospective jurors had a proper appreciation of the presumption of innocence.

Petitioner has complained that the reading of the indictment by the Commonwealth's Attorney after the attorney had made his opening statement was reversible error.

It was purely a matter of context in presenting the indictment and the Commonwealth's opening statement for the trial jury's information and consideration.

Appellant in his brief states:

> "Later, during the prosecutor's questioning of James Maddox, the alleged robbery victim, the following colloquy occurred.

Q.35 Did you subsequently take out a warrant against Mike Taylor?

A. Yeah.

Q.36 And then you later appeared before the Franklin County Grand Jury to seek an indictment?

A. Yes, Sir.

By informing the jury that Mr. Maddox, the prosecution's only witness, had appeared before the Franklin County Grand Jury to seek an indictment, the prosecution was able to convey to the jurors that the indictment of appellant was an explicit affirmation by the grand jury of the veracity of Mr. Maddox's allegation that appellant robbed him.

In view of the paucity of evidence against appellant and the prosecutor's calculated emphasis of the grand jury's decision to indict appellant on the basis of Mr. Maddox's testimony, appellant's counsel requested the trial judge to give the following instruction." (TE p.20-21; 36). [Emphasis added].

Petitioner has belatedly objected to the history and a part of the record in the instant case being introduced in open court.

The petitioner's contention that since Mr.Maddox was the only prosecution witness to appear before the grand jury conveyed to the jurors that the indictment of petitioner was an explicit affirmation by the grand jury of the veracity of Mr. Maddox is a far-out, far-fetched conclusion totally devoid of merit. The jury knew that an indictment was only an initiating piece of paper containing a charge (TE p.7).

Very early in petitioner's voir dire examination Mr. Judy, appellant's counsel, in speaking to the prospective jurors in open court stated:

"You all understand an indictment is only a charge, the initiating paper which brings us here today, and that in and of itself the indictment is no evidence, no way. It's merely a document that gets us here to this stage in the proceedings. Do you understand that's not to be considered as evidence? How many of you have sat on a jury before this term?"

Petitioner through counsel has greatly underestimated the intelligence of circuit court jurors.

The fact that the grand jury returned an indictment never has meant to convey to anyone anything other than that it contained a charge which should be considered by the court, the Commonwealth's Attorney and possibly a trial jury. It has never been considered or understood to be evidence. The trial judge very properly refused to give the tendered instruction appearing on the last page of the Transcript of Evidence and listed in petitioner's court of appeals brief as being on page 36.

The trial jurors if they had not prior thereto understood from the time of their voir dire interrogations been informed and understood that the indictment was only a written statement of a charge of which the accused may or may not be guilty and carried neither probative force or implication of guilt whatever. (TE p.1).

Hence, further instructions to the jury would have only belabored the point and it was not necessary that the court supply the trial jury with a written repetitious phillippic thereon. Individuals and often attorneys, particularily those of limited trial experience are prone to underestimate the ability and intelligence of a Kentucky Circuit Court Jury.

In Kentucky it has long been the practice to supply the accused with a copy of the indictment upon arraignment and to have the indictment read in open court by the clerk, judge or Commonwealth Attorney at the beginning of the trial. The procedure is

intended to be purely informative and at no time is it considered as evidence, or, as an instrument of impugnation of the guilt of the indictee, or, as affecting the fairness of the trial of the indictee, or, as a dilution of the presumption of innocence which stays with the accused until he is proven guilty beyond a reasonable doubt.

The case of Estelle v. Williams, 96 S.Ct. 1691,1692, 48 L.Ed. 126 (1976) was discussed in Question I in which its distinguishing and applicable features are discussed at length. The case of In Re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) was a juvenile case and discussed "proof beyond a reasonable doube" and "preponderance of evidence" at some length and held that "juveniles like adults, were constitutionally entitled to proof beyond a reasonable doubt during the adjudicatory stage when the juvenile was charged with an act which would constitute a crime if committed by an adult."

There is nothing in the presumption of innocence instruction argument presented in appellant's case which made it manditory that the instruction presented by him be given by the court. There was no error of constitutional demension.

On Page 2 of the petitioner's petition he states and presents two (2) questions for the court to consider in the instant case. On page 12 of the petitioner's petition he presents for the first time in the following verbiage the following question:

> "The decision below affirming the trial judge's refusal, despite defense objection to instruct the jury on the presumption of innocence conflicts with the decisions of the highest courts of numerous states."

This question has previously been discussed at length herein. Petitioner in an appartent effort to pressure this Court by citing cases from other states, none from Kentucky, lists the following fourteen cases on pages 9 to 11 inclusive of his brief in erroneously alleging that they support his contention: State v. Cokely, W.Va., 226 S.E. 2d 40,43 (1976); Allen v. Commonwealth, Va. 180 S.E. 2d 513,516; Whaley v. Commonwealth, Va. 200 S.E. 2d 556 (1973); People v. Hill, Colo. 512 P.2d 257, 258,259 (1973); Ealey v. State, Ga.App.94 232 S.E. 2d 620,620-621 (1977); State v. Henderson, 81 N.M. 270, 466 P.2d 116,118 (1970); Reynolds v. State, Fla. App. 332 So.2d 27,29 (1976); State v. McHenry, Wash. 558 P.2d 188, 190 (1977); People v. McClintic, Mich. 160 N.M. 461 (1916); People v. Leavitt, 301 N.Y. 113, 92 N.E. 2d 915 (1950); State v. Stoddard, Mont. 412 P.2d 827 (1966); State v. Coleman, Mont. 460 S.W. 2d 719 (1970); Gilleylen v. State, Ala. 272 So.2d 905 (1973) and People v. Dornblut, 24 A.2d 639, 262 NYS 2d 414 (1965).

There are fourteen cases cited from ten different states or one and one-fifth of the total number of states but not one case from the Commonwealth of Kentucky. The law in the different states vary as do court rules, statutory law, case law, the constitutions and criminal practices. Not one of the cases cited control the one now before this court. The facts are different and other facets of the cases distinguish them. Not one of the cases in the trial records stresses the presumption of innocence as often or to the degree to be found in the case sub judice.

The trial judge in the instant case followed the applicable case law of Kentucky which petitioner admits in his brief.

On Page 12 of his brief Petitioner has added a number 3 statement or question in which he states:

> "The decision below affirming the trial judge's refusal, despite defense objection, to instruct the jury on the indictment's lack of evidentiary value conflicts with previous decisions of federal courts of appeal and a prior decision of the Supreme Court."

The affirming of the trial judge's action in refusing the written instruction requested on the indictment's lack of evidentiary value was not in conflict with but consistent with previous decisions of Kentucky's highest court. Previously in the response on pages 7,8,9,10,17 and 18 it has been repeatedly pointed out that the reading of the indictment was for the purpose of informing and enlightening the trial jury of the nature of the charges on which the petitioner was to be heard, tried and his guilt or innocence determined. The heavy burden of proving the petitioner guilty beyond a reasonable doubt rested upon the Commonwealth; that the presumption of innocence had to be overcome by proof.

It was not manditory however, that the two obvious self-serving tendered instructions of the petitioner be given the trial jury by the trial court judge. From the record and evidence transcripts a seven year old child would understand that the indictment was "merely a typed charge on a piece of paper"and not evidence of the petitioner's guilt or innocence. See Baker v. Commonwealth, 134 S.W. 2d 997 at page 999; Johnson v. Commonwealth, 262 S.W. 2d, 263, 297.

The petitioner has not stated a single valid reason for the granting of a writ of certiorari.

CONCLUSION

For the reasons herein set out and others which the record, briefs, judgments and decisions disclose the writ of certiorari to review the questions stated should be denied.

Respectfully submitted,

ROBERT E. STEPHENS
ATTORNEY GENERAL

GUY C. SHEARER
ASSISTANT ATTORNEY GENERAL

COUNSEL FOR RESPONDENT

PROOF OF SERVICE

I hereby certify that the foregoing Response to Petition for Writ of Certiorari has been mailed, postage prepaid, to Honorable J. Vincent Aprile II, Assistant Deputy Public Defender, 625 Leawood Drive, Frankfort, Kentucky 40601 this the 9th day of November, 1977.

Assistant Attorney General

Michael TAYLOR, Appellant,

v.

COMMONWEALTH of Kentucky, Appellee.

Court of Appeals of Kentucky.

April 1, 1977.

Discretionary Review Denied June 29, 1977.

Defendant was convicted before the Franklin Circuit Court, Henry Meigs, J., of second-degree robbery, and he appealed. The Court of Appeals, Howard, J., held that refusal to give defendant's requested instruction on presumption of innocence was not error; that failure to instruct on indictment's lack of evidentiary value did not deny defendant due process; that defendant was not entitled to reversal of conviction on basis of prosecutor's unobjected to references to facts which related to defendant's character; but that failure to make a presentencing investigation before defendant was sentenced and failure to consider probation or conditional discharge was error.

Affirmed in part; reversed in part. Wilhoit, J., dissented and filed opinion.

1. Criminal Law ⇐829(9)

Refusal to give accused's requested instruction on presumption of innocence was not error in prosecution for second-degree robbery, in view of fact that an instruction on reasonable doubt was given. KRS 515.030.

2. Constitutional Law ⇐268(2)

In prosecution for second-degree robbery, failure to instruct on indictment's lack of evidentiary value did not deny accused due process. KRS 515.030.

3. Criminal Law ⇐1037.1(1)

Accused was not entitled to reversal of conviction of second-degree robbery on basis of prosecutor's unobjected to references, during closing argument, to facts which related to accused's character and which had not been placed into evidence, in view of indication that such references did not meet the standard of prejudice of being so apparent and great as to result in a manifest injustice. KRS 515.030.

4. Criminal Law ⇐986

In prosecution for second-degree robbery, failure to make a presentencing investigation before accused was sentenced and failure to consider probation or conditional discharge was error. KRS 515.030, 532.050, 533.010.

J. Vincent Aprile, II, Asst. Public Defender, Frankfort, for appellant.

Guy C. Shearer, Asst. Atty. Gen., Frankfort, for appellee.

Before HAYES, HOWARD and WILHOIT, JJ.

HOWARD, Judge.

Michael Taylor was convicted by a Franklin Circuit Court jury of violating *Ky.Rev. Stat.* Ch. 515.030 (hereinafter KRS), to wit second degree robbery. Evidence was presented that Taylor along with an accomplice went twice to the home of James Maddox on the evening of February 16, 1976. On the second visit when Maddox again would not allow them to enter his home, Taylor hit him and took his wallet and house key. Taylor and Maddox were the only witnesses to testify at the trial. Maddox testified that he had known Taylor for approximately 15 years and was certain he was the person who robbed him. The appellant denied the robbery testifying that he was in a parked automobile with three other persons the entire evening.

[1] Defense counsel tendered and requested that an instruction on presumption of innocence be given to the jury. The trial court refused the request, but gave an instruction on reasonable doubt. The appellant contends that he was substantially prejudiced by the trial court's failure to instruct on presumption of innocence. We find no evidence to support this contention. The well established law of Kentucky has been that as long as the trial court instructs the jury on reasonable doubt an instruction on the presumption of innocence is not necessary. *Mink v. Commonwealth*, 228 Ky. 674, 15 S.W.2d 463 (1926); *Swango v. Commonwealth*, 291 Ky. 690, 165 S.W.2d 182 (1942). We find no reason to change the established law on this point.

[2] The second error appellant asserts on appeal is that he was substantially prejudiced by the trial court's failure to instruct on the indictment's lack of evidentiary value. We find no merit in the appellant's argument that failure to give such an instruction denies the defendant due process of the law.

[3] In his closing argument the prosecutor made reference to facts which had not been placed into evidence concerning the defendant's character. While the Kentucky court has held in several cases that such remarks are improper and allowed reversal of the case on that point, the defendant failed to object to these remarks thus not preserving them for appellate review. *Lynch v. Commonwealth*, Ky., 472 S.W.2d 263 (1971). We do not feel that the statements meet the standard of prejudice of being so apparent and great as to result in a manifest injustice as set forth in *Ferguson v. Commonwealth*, Ky., 512 S.W.2d 501 (1974) and *Futrell v. Commonwealth*, Ky., 437 S.W.2d 487 (1969), to allow reversal on the impropriety in the argument despite defendant's failure to object at the proper time.

[4] The appellant contends that no presentencing investigation was made in his case as required by KRS 532.050 before he was sentenced nor was the question of probation or conditional discharge as provided in KRS 533.010 considered. It appears after examining the record that these allegations are correct. The recent Supreme Court case of *Brewer v. Commonwealth*, Ky., — S.W.2d — (1977) (24 Ky.Law Summary 1) held that the requirements of KRS 532.050 are mandatory and not within the discretion of the trial court judge. In regard to KRS 533.010 the Supreme Court in *Brewer, supra* stated that this determination by the court is discretionary rather than mandatory but stated that the statute requires that probation or conditional discharge be given consideration.

Therefore, we find no error in the verdict of the jury, but we do find error in the trial court's sentencing procedure. On the latter point, this case is reversed with directions to the Franklin Circuit Court to take appropriate action consistent with this opinion.

HAYES, J., concurs.

WILHOIT, J., dissents.

WILHOIT, Judge, dissenting.

I respectfully dissent from so much of the opinion of the majority as holds that an instruction on the presumption of innocence when requested need not be given by the court because the instruction on reasonable doubt suffices. It strikes me as bordering on the fatuous to say that a jury must be instructed on one of the most basic principles of our criminal law but not the other. The reason given for this anomaly in Kentucky jurisprudence has heretofore been that an instruction on the presumption of innocence is "too favorable to the defendant", *Swango v. Commonwealth*, 291 Ky. 690, 165 S.W.2d 182 (1942). Most of those rights embodied in the modern concept of due process are "favorable to the defendant", but that is their very reason for existence. Not every person charged in a criminal complaint or indicted by a grand jury is guilty of a crime. In recognition of this, our system has built in certain safeguards to protect the innocent. One of these safeguards is the so-called presumption of innocence of a criminal defendant. There is certainly no such presumption in the minds of jurors about to try a case. In fact, by the time the indictment is read to the jurors, the opposite presumption is likely to be present in their minds. The law builds in the presumption of innocence, but it is of no use to the defendant if the jury is never told about it.

While an instruction on reasonable doubt does much the same thing that one on the presumption of innocence would do, I believe there is a subtle distinction between the two and one does not completely perform the job of the other. As pointed out by Wigmore, the concept of presumption of innocence "cautions the jury to put away from their minds all of the suspicion that arises from the arrest, the indictment, and the arraignment and to reach their conclusion solely from the legal evidence adduced." He further points out that this caution is "indeed particularly needed in criminal cases". IX J. Wigmore, *Evidence* § 2511 (3d ed. 1940).

I believe the Supreme Court of Kentucky would now reject the old line of cases relied upon by the majority.

Albert THOMPSON et al., Appellants,

v.

KENTUCKY POWER COMPANY, a corporation, Appellee.

Court of Appeals of Kentucky.

April 8, 1977.
Discretionary Review Denied
June 29, 1977.

Appeal was taken from the Lawrence Circuit Court, W. B. Hazelrigg, J., dismissing an attempted appeal to that court from a condemnation judgment entered in the county court. The Court of Appeals, Cooper, J., held that appeal from judgment of county court in condemnation action was not perfected as required by statutes and rules and, hence, was properly dismissed by circuit court where period of eight years which lapsed between time judgment was entered by county court and time original appeal was filed with circuit court was unreasonable, and appellants not only failed to file a copy of judgment with clerk of circuit court within 30 days from date of judgment, but also failed to revive action in name of representative or successor of deceased landowners against whom judgment was taken.

Affirmed.

1. Dismissal and Nonsuit ⇐60(1), 62

Application of rule that a defendant may move for dismissal of an action or of any claim against him for failure of plaintiff to prosecute or to comply with rules or any order of court is a matter that is within discretion of court. CR 41.02.

2. Eminent Domain ⇐257

Strict adherence to procedures set forth in statute for filing an appeal from a judgment authorizing a petitioner to take possession of land or material is required by courts in all condemnation suits. KRS 416.280.

3. Eminent Domain ⇐257

Procedures set forth in statute for taking an appeal from a judgment authorizing a petitioner to take possession of land or material are full and complete and must be followed by landowner. KRS 416.280.

4. Eminent Domain ⇐257

Failure of a landowner to file an appeal bond as required by statute setting forth procedures for taking an appeal from a judgment authorizing a petitioner to take possession of land or material warrants dismissal of appeal. KRS 416.280.

5. Eminent Domain ⇐257

Appeal from judgment of county court in condemnation action was not perfected as required by statutes and rules and, hence, was properly dismissed by circuit court where period of eight years which lapsed between time judgment was entered by county court and time original appeal was filed with circuit court was unreasonable, and appellants not only failed to file a copy of judgment with clerk of circuit court within 30 days from date of judgment, but

COMMONWEALTH OF KENTUCKY

Court of Appeals

MANDATE

ORVILLE TAYLOR

File No. CA-132-77
VS. Opinion Rendered APRIL 1, 1977

Appeal From FRANKLIN

Circuit Court Action No. 10, 7744

COMMONWEALTH OF KENTUCKY

The Court being sufficiently advised, it sees the judgment herein is erroneous, in part.

It is therefore considered that the judgment be affirmed in part and reversed in part with directions to correct the judgment in conformity with the views expressed in the opinion herein; which is ordered to be certified to said court.

JUNE 29, 1977 - Movant's Discretionary Review denied by the Supreme Court.

A Copy - Attest:

Issued July 11, 1977

JOHN C. SCOTT, CLERK

OPINION RENDERED: April 1, 1977
TO BE PUBLISHED

COURT OF APPEALS OF KENTUCKY

NO. CA-152-MR

MICHAEL TAYLOR — APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE HENRY MEIGS, JUDGE
CRIMINAL ACTION NO. 7844

COMMONWEALTH OF KENTUCKY — APPELLEE

AFFIRMING IN PART; REVERSING IN PART

*** * * * * * * * *** * * * * * * * ***

BEFORE: HAYES, HOWARD, and WILHOIT, Judges.

HOWARD, JUDGE. Michael Taylor was convicted by a Franklin Circuit Court jury of violating Ky. Rev. Stat. Ch. 515.030 (hereinafter KRS), to wit second degree robbery. Evidence was presented that Taylor along with an accomplice went twice to the home of James Maddox on the evening of February 16, 1976. On the second visit when Maddox again would not allow them to enter his home, Taylor hit him and took his wallet and house key. Taylor and Maddox were the only witnesses to testify at the trial. Maddox testified that he had known Taylor for approximately 15 years and was certain he was the person who robbed him. The appellant denied the robbery testifying that he was in a parked automobile with three other persons the entire evening.

Defense counsel tendered and requested that an instruction on presumption of innocence be given to the jury. The trial court refused the request, but gave an instruction on reasonable doubt. The appellant contends that he was substantially prejudiced by the trial court's failure to instruct on presumption of innocence. We find no evidence to support this contention. The well established law of Kentucky has been that as long as the trial court instructs the jury on reasonable doubt an instruction on the presumption of innocence is not necessary. Mink v. Commonwealth, 228 Ky. 674, 15 S.W. 2d 463 (1926); Swango v. Commonwealth, 291 Ky. 690, 165 S.W. 2d 182 (1942). We find no reason to change the established law on this point.

The second error appellant asserts on appeal is that he was substantially prejudiced by the trial court's failure to instruct on the indictment's lack of evidentiary value. We find no merit in the appellant's argument that failure to give such an instruction denies the defendant due process of the law.

In his closing argument the prosecutor made reference to facts which had not been placed into evidence concerning the defendant's character. While the Kentucky court has held in several cases that such remarks are improper and allowed reversal of the case on that point, the defendant failed to object to these remarks thus not preserving them for appellate review. Lynch v. Commonwealth, Ky., 472 S.W. 2d 263 (1971). We do not feel that the statements meet the standard of prejudice of being so apparent and great as to result in a manifest injustice as set forth in Ferguson v. Commonwealth, Ky., 512 S.W. 2d 501 (1974) and Futrell v. Commonwealth, Ky., 437 S.W. 2d 487 (1969), to allow reversal on the impropriety in the argument despite defendant's failure to object at the proper time.

The appellant contends that no presentencing investigation was made in his case as required by KRS 532.050 before he was sentenced nor was the question of probation or conditional discharge as provided in KRS 533.010 considered. It appears after examining the record that these allegationsare correct. The recent Supreme Court case of Brewer v. Commonwealth, Ky., ____ S.W. 2d ____ (Jan. 14, 1977) (24 Ky. Law Summary 1) held that the requirements of KRS 532.050 are mandatory and not within the discretion of the trial court judge. In regard to KRS 533.010 the Supreme Court in Brewer, supra stated that this determination by the court is discretionary rather than mandatory but stated that the statute requires that probation or conditional discharge be given consideration.

Therefore, we find no error in the verdict of the jury, but we do find error in the trial court's sentencing

procedure. On the latter point, this case is reversed with directions to the Franklin Circuit Court to take appropriate action consistent with this opinion.

Judge Hayes concurring. Judge Wilhoit dissenting.

Attorney for the Appellant:

Hon. J. Vincent Aprile, II
Assistant Deputy Public Defender
625 Leawood Drive
Frankfort, KY 40601

Attorney for the Appellee:

Hon. Guy C. Shearer
Assistant Attorney General
Capitol Building
Frankfort, KY 40601

COURT OF APPEALS OF KENTUCKY

CA-152-MR

MICHAEL TAYLOR — APPELLANT

V. — APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE HENRY MEIGS, JUDGE
INDICTMENT NO. 7844

COMMONWEALTH OF KENTUCKY — APPELLEE

DISSENTING

* * * * * *

WILHOIT, JUDGE: I respectfully dissent from so much of the opinion of the majority as holds that an instruction on the presumption of innocence when requested need not be given by the court because the instruction on reasonable doubt suffices. It strikes me as bordering on the fatuous to say that a jury must be instructed on one of the most basic principles of our criminal law but not the other. The reason given for this anomaly in Kentucky jurisprudence has heretofore been that an instruction on the presumption of innocence is "too favorable to the defendant", Swango v. Commonwealth, 291 Ky. 690, 165 S.W.2d 185 (1942). Most of those rights embodied in the modern concept of due process are "favorable to the defendant", but that is their very reason for existence. Not every person charged in a criminal complaint or indicted by a grand jury is guilty of a crime. In recognition of this, our system has built in certain safeguards to protect the innocent. One of these safeguards is the so-called presumption of innocence of a criminal defendant. There is certainly no such presumption in the minds of jurors about to try a case. In fact, by the time the indictment is read to the jurors, the opposite presumption is likely to be present in their minds. The law

builds in the presumption of innocence, but it is of no use to the defendant if the jury is never told about it.

While an instruction on reasonable doubt does much the same thing that one on the presumption of innocence would do, I believe there is a subtle distinction between the two and one does not completely perform the job of the other. As pointed out by Wigmore, the concept of presumption of innocence "cautions the jury to put away from their minds all of the suspicion that arises from the arrest, the indictment, and the arraignment and to reach their conclusion solely from the legal evidence adduced." He further points out that this caution is "indeed particularly needed in criminal cases". IX J. Wigmore, Evidence § 2511 (3d ed. 1940).

I believe the Supreme Court of Kentucky would now reject the old line of cases relied upon by the majority.

Attorney for Appellant:

J. Vincent Aprile, II
Ass't Public Defender
625 Leawood Drive
Frankfort, Ky. 40601

Attorney for Appellee:

Guy C. Shearer
Ass't Attorney General
Capitol Building
Frankfort, Ky. 40601

John C. Scott
Clerk

OFFICE OF
CLERK OF COURT OF APPEALS
FRANKFORT, KENTUCKY 40601

U.S. 127 Twilight Trail
564-7920

CERTIFICATION

I, Jeanette Trusty, do hereby certify that the foregoing Opinion Affirming in Part and Reversing in Part, rendered April 1, 1977; and Mandate issued July 11, 1977, in the case of Michael Taylor vs. Commonwealth of Kentucky, are true and correct copies as same appear on file in my office.

Done this 16th day of September, 1977, at Frankfort, Kentucky.

Jeanette Trusty

Jeanette Trusty, Deputy Clerk
Court of Appeals of Kentucky

SUPREME COURT OF KENTUCKY
SC-249-D

MICHAEL TAYLOR — MOVANT

V.

COMMONWEALTH OF KENTUCKY — RESPONDENT

ORDER DENYING MOTION TO
SUPPLEMENT RECORD AND ORDER
DENYING DISCRETIONARY REVIEW

The motion of the Commonwealth of Kentucky that it be permitted to supplement the record in this proceeding is denied.

The motion of Michael Taylor for a review of the decision of the Court of Appeals is denied, and the decision stands affirmed.

ENTERED June 29, 1977.

Chief Justice

MARTHA LAYNE COLLINS
CLERK

OFFICE OF THE CLERK
SUPREME COURT OF KENTUCKY
STATE CAPITOL, FRANKFORT, 40601

ROOM 209
(502) 564-4720

I, Martha Layne Collins, Clerk of the Supreme Court of Kentucky, do hereby certify that the attached Order entered by the Court on June 29, 1977, in the case of Michael Taylor vs. Commonwealth of Kentucky, File No. SC-249-D, is a true and correct copy as it appears on file in my office.

Done this 16th day of September, 1977, at Frankfort, Kentucky.

Martha Layne Collins
Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-5549

MICHAEL TAYLOR,

Petitioner,

v.

COMMONWEALTH OF KENTUCKY,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

BRIEF FOR PETITIONER

J. VINCENT APRILE II
Assistant Deputy Public Defender
Third Floor
State Office Building Annex
Frankfort, Kentucky 40601

Attorney for Petitioner

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

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BRIEF FOR PETITIONER

OPINION BELOW

The opinion of the Court of Appeals of Kentucky (Appendix, hereinafter designated App., pp. 54-58) is reported as *Taylor v. Commonwealth*, Ky. App., 551 S.W.2d 813 (1977).

JURISDICTION

The opinion of the Court of Appeals of Kentucky was entered on April 1, 1977. Petitioner's timely motion for discretionary review in the Supreme Court of Kentucky was denied on June 29, 1977 (App., p. 59). The mandate of the Court of Appeals of Kentucky was issued on July 11, 1977 (App., p. 60). The petition for writ of certiorari was granted on November 28, 1977. The jurisdiction of this Court is invoked on the basis of 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

1. Whether petitioner was deprived of his constitutional right to due process of law by the refusal of the trial court to give an instruction on the presumption of innocence when petitioner's counsel requested and tendered such an instruction.

2. Whether petitioner was denied his constitutional right to due process by the refusal of the trial court to give an instruction on the indictment's lack of evidentiary value when petitioner's counsel requested and tendered such an instruction.

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved is the Fourteenth Amendment to the Federal Constitution.

STATEMENT OF THE CASE

In March of 1976, Michael Taylor, the petitioner, was indicted by the Franklin Circuit Court Grand Jury in Frankfort, Kentucky for the offense of second degree robbery in violation of Kentucky Revised Statute (KRS) 515.030 (App., pp. 5-6).[1] According to the indictment, Mr. Taylor on or about February 16, 1976, committed second degree robbery "when, in the course of committing theft, he used physical force upon James Maddox" and "unlawfully took from Mr. Maddox a wallet containing ten ($10)-fifteen ($15) dollars and his house key" (App., p. 5).

Mr. Taylor on April 5, 1976 waived formal arraignment and entered a plea of not guilty to the charge in the indictment (App., p. 7).

Mr. Taylor's case was tried in Franklin Circuit Court on May 24, 1976 (App., pp. 9, 10, 15). During *voir dire* of the veniremen, the prosecutor explained, "Now, the prosecution has only one witness in this case and that's all we're ever required to have generally" (App., p. 16). The prosecutor then asked, "Would that fact

---

[1] KRS 515.030 provides:

> (1) A person is guilty of robbery in the second degree when, in the course of committing theft, he uses or threatens the immediate use of physical force upon another person with intent to accomplish the theft.
>
> (2) Robbery in the second degree is a Class C felony.

Under the Kentucky Penal Code, the authorized maximum term of imprisonment for a Class C felony is "not less than five years nor more than ten years." KRS 532.060(2)(c).

alone, the fact that there's only one witness for the prosecution, keep you from returning a verdict of guilty against the defendant if you believed the prosecution's witness?" (App., p. 16).

In the course of his *voir dire* of the potential jurors, trial defense counsel commented, "You all understand an indictment is only a charge, the initiating paper which brings us here today, and that in and of itself the indictment is no evidence, no way" (App., p. 17). Defense counsel added, "It's merely a document that gets us here to this stage in the proceedings. Do you understand that's not to be considered as evidence?" (App., p. 17).

Later in his *voir dire* of the jury, defense counsel addressed the presumption of innocence, asking whether the jurors agreed and understood that Michael Taylor "as he sits here today is a young man who is presumed to be innocent of the charge of second degree robbery" (App., p. 19).[2]

---

[2] Defense counsel's reference to the presumption of innocence occurred in the following context:

> I'm sure you all will agree to this final question as regards the principle of doubt. Do each of you agree and understand that Michael Taylor as he sits here today is a young man who is presumed to be innocent of the charge of second degree robbery, that this innocence has to be overcome by the Commonwealth to meet a standard of what we call beyond a reasonable doubt and that in the event that at the conclusion of the evidence, you have a reasonable doubt then it is your duty to return a verdict of not guilty. Do each of you understand the principle of innocence, the requirement of reasonable doubt? That reasonable doubt must be removed in order to find a verdict of guilty? (App., p. 19).

Because two jurors were dismissed on peremptory challenges by the defense, two additional veniremen were called (App., pp. 19-20). Questioning these new jurors, the prosecutor recalled that the defense attorney had previously "advised that each defendant is presumed innocent until proven guilty beyond a reasonable doubt" (App., p. 20). The prosecuting attorney then asked, "If you serve in this case will you follow that rule of law?" (App., p. 20).

During defense counsel's questioning of the two new jurors, he asked, "Do both of you subscribe to the principle of law and *the Judge will instruct you* that the defendant is presumed innocent until proven guilty with sufficient proof to prove beyond a reasonable doubt for you to return a verdict of guilty" (App., p. 21; emphasis added).

After the jury was selected in the case at bar, the prosecutor presented his opening statement (App., p. 21). During his initial remarks to the jury, the prosecutor noted that "the essence of the evidence of the Commonwealth" would include that the alleged robbery victim "came down and took out the warrant and the Grand Jury returned this indictment" (App., p. 22). The prosecutor concluded by reading the indictment to the jury (App., p. 23). After petitioner's counsel addressed the jury briefly, the Commonwealth commenced its case (App., p. 24).

In an effort to prove the charged offense, the prosecution called but one witness, James Maddox, the victim of the alleged robbery (App., p. 24). Mr. Maddox, a fifty-one year old male, testified that he had resided in Frankfort for "about sixteen or seventeen years" and had known Mr. Taylor "about fifteen years"

(App., p. 25). Prior to the alleged robbery, Mr. Taylor had visited Mr. Maddox's house "about three times" (App., p. 25).

Mr. Maddox related that about 8:15 p.m. on February 16, 1976 petitioner came to his house and knocked on the door. When Mr. Maddox opened the door, petitioner allegedly said, "Let us in" (App., p. 26). Mr. Maddox retorted, "Boy, I got to go to bed. I got to get up early in the morning and go back to work" (App., p. 26). At that point, according to Mr. Maddox, petitioner, who was accompanied by a second unidentified person, responded "Okay" and the two unwelcomed visitors left (App., p. 26).

Approximately fifteen minutes later, these same two individuals "came back . . . knocked on the door again and said you ain't going to bed" (App., p. 26). They then proceeded to "push their way in" (App., p. 26). At that point Mr. Maddox supposedly "opened the door and let them in" (App., p. 26). When Mr. Maddox told his visitors he had "to go to bed," petitioner allegedly said, "No you ain't neither" (App., p. 26). Mr. Maddox responded, "Well, I'll call the police and get you out of my house" (App., p. 26). As Mr. Maddox "stepped out" his door, "this other boy" jumped on his back and petitioner allegedly hit Mr. Maddox "in the side of the head" (App., p. 26). After petitioner and "the other boy" allegedly pushed Mr. Maddox to the ground, petitioner took Mr. Maddox's pocketbook and key from his left pocket and both of the assailants "broke off running" (App., p. 26). Mr. Maddox added that he had "ten to fifteen dollars" in his wallet as well as various papers and a bus ticket (App., p. 27).

Mr. Maddox testified that after the incident occurred he called the police and reported the alleged offense (App., pp. 27-28). The prosecutor then elicited that Mr. Maddox had subsequently taken out a warrant against petitioner and had "appeared before the Franklin County Grand Jury to seek an indictment" (App., p. 28).

At the conclusion of the direct examination, Mr. Maddox explained that he did not know the other person who was with petitioner on the night in question (App., p. 28). The witness had never seen the other person before and had seen him but one time since the incident (App., p. 28). Under cross-examination, Mr. Maddox admitted that he has had petitioner, petitioner's friends, and other people that live in the project over to his apartment on occasion (App., p. 29). Mr. Maddox also acknowledged that he "provided beer" for these people (App., p. 29).

After Mr. Maddox was excused as a witness, the Commonwealth rested and petitioner's counsel moved for a directed verdict (App., p. 31). That motion was summarily overruled (App., p. 31).

Michael Taylor, the only defense witness, explained that he was twenty years of age and that he resided with his mother and stepfather in Frankfort, Kentucky (App., p. 32). He was employed at George's Restaurant and had been for six years (App., p. 32).

Mr. Taylor denied under oath that he had committed the acts which Mr. Maddox had described on the witness stand (App., p. 32). Although petitioner testified that he had known Mr. Maddox "about three or four years" and had been to his house "several times," he asserted that he had never struck Mr.

Maddox (App., pp. 32-33). According to petitioner, on the occasions he visited Mr. Maddox, he and the other people present "sat around and drank, watched television, played cards, talked . . . [and] different things" (App., p. 33).

Mr. Taylor acknowledged that "[m]aybe a few days before" the alleged robbery he had been at Mr. Maddox's apartment with Robert Chenault and with William Taylor, his brother (App., p. 33). However, petitioner adamantly denied being at Mr. Maddox's residence on February 16, 1976, the day of the alleged robbery (App., p. 33).

Mr. Taylor recalled that on Monday, February 16, 1976, he went to the restaurant about eleven o'clock in the morning and worked, cleaning up the premises (App., p. 33). When he left the restaurant, petitioner went to the college for awhile. After that, he returned to his home and "laid down for awhile" (App., pp. 33-34). About seven p.m., petitioner went out with two other fellows and they sat in a broken down car from about seven p.m. until approximately two o'clock the next morning (App., p. 34). The immovable car belonged to Robert Hayden, but petitioner's cousin, Robert Davis, as well as another man named Wade were with petitioner that night (App., p. 34).

During cross-examination, the prosecutor elicited that Michael Taylor had only a ninth grade education and earned but forty dollars a week by working part-time at the restaurant (App., pp. 35-36).

On re-direct examination, petitioner testified that he had been to Mr. Maddox's house since the incident, and Mr. Maddox had told him that "he didn't even remember who had been to his house" (App., p. 39).

After Mr. Taylor's testimony was completed, the defense rested (App., p. 39). Defense counsel then renewed his motion for a directed verdict, but again was overruled (App., p. 39).

During an in-chambers hearing on the instructions, petitioner's counsel objected to the trial court's refusal to give to the jury the instructions tendered by the defense (App., pp. 39-40). The instructions requested by the defense, but not given by the trial judge, included instructions on the presumption of innocence (Defense Instruction No. 4) and on the indictment's lack of evidentiary value (Defense Instruction No. 5).[3]

The presumption of innocence instruction requested by the defense reads as follows:

> The law presumes a defendant to be innocent of a crime. Thus a defendant, although accused, begins the trial with a "clean slate". That is, with no evidence against him. The law permits nothing but legal evidence presented before a jury to be considered in support of any charge against the accused. So the presumption of innocence alone is sufficient to acquit a defendant, unless you are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all of the evidence in the case (Defense Instruction No. 4; App., p. 53).

The defense instruction on the indictment's lack of evidentiary value states:

> The jury is instructed that an indictment is in no way evidence against the defendant and no adverse inference can be drawn against the

---

[3]The instructions tendered by the defense were made appendices to the transcript of evidence (App., pp. 51-53).

> defendant from a finding of the indictment. The indictment is merely a written accusation charging the defendant with the commission of a crime. It has no probative force and carries with it no implication of guilt (Defense Instruction No. 5; App., p. 53).

During the *in camera* hearing on instructions, defense counsel obtained leave of court to dictate into the record at the conclusion of the trial the defense's formal objections pertinent to the instructions (App., p. 40).

The trial judge declined to give any presumption of innocence instruction and instead instructed the jury only on the substantive offense of second degree robbery, reasonable doubt, and the necessity of a unanimous verdict (App., p. 40).[4]

In the course of his closing argument, defense counsel emphasized the presumption of innocence and its application to the petitioner:

> As I indicated to you in the voire [sic] dire when we talked about the questions and answers at the very beginning, that you all subscribe to the principle of the presumption of innocence, that Michael Taylor is presumed innocent – and I

[4]The trial judge gave the following instruction on reasonable doubt:

> Number two, if upon the whole case you have a reasonable doubt as to the defendant's guilt you will find him not guilty. The term "reasonable doubt' as used in these instructions means a substantial doubt, a real doubt, in that you must ask yourself not whether a better case might have been proved but whether after hearing all the evidence you actually doubt that the defendant is guilty (App., p. 40).

> believe he is innocent – that that presumption remains with him throughout the trial. He has no burden to put on any proof and it is the, it's the obligation and responsibility of the Commonwealth to prove his guilt beyond a reasonable doubt (App., p. 43).

In response, the prosecutor, early in his summation, denigrated the presumption of innocence and defense counsel's use of that legal principle:

> This defendant, like every other defendant who's ever been tried who's in the penitentiary or in the reformatory today, has this presumption of innocence until proven guilty beyond a reasonable doubt. That's just a presumption on his behalf . . . (App., p. 45).

Immediately thereafter the prosecutor asked the jurors to "[n]otice how the Court has defined for you in the instruction the term 'reasonable doubt' " (App., p. 45). The prosecutor recalled that the trial judge's instruction had defined reasonable doubt as "a substantial doubt, a big doubt, a real doubt, in that you must ask yourself not whether a better case might have been proved but whether after hearing all the evidence you actually doubt the defendant is guilty" (App., p. 45).

In an endeavor to justify the lack of any evidence corroborating Mr. Maddox's testimony, the prosecutor explained to the jury:

> Well, this defendant is sharp enough he knows to get rid of the wallet and the things of that nature. You don't keep evidence of a crime around. One of the first things *defendants* do after they rip someone off, they get rid of the evidence as fast and as quickly as they can (App., p. 45; emphasis added).

At that juncture, the prosecutor opined that "[t]his is merely a case of contrast in a large sense" between "a very youthful defendant and a gentleman who is the complaining witness two and a half times his age" (App., p. 45). Continuing his description of the "contrast," the prosecutor told the jurors:

> You have one who pays for what he gets; the other who takes what he wants. You have one who respects the law and who works at it six days a week; you have another one who has no respect for the law (App., p. 45).

Moments later the prosecutor focused his attention on defendants in general and informed the jury that "they [defendants] like to come into court and play on your sympathy" (App., p. 46). Expanding on this theme, the prosecutor discoursed:

> They [defendants] don't want you to make your mind go back to the crime and to those events that took place. They want you to look at them and say well, I wouldn't do anything like that, you just know I wouldn't (App., p. 46).

Next the prosecutor argued that the "motive" for the robbery was "money" because Michael Taylor "was working part time over here at Spencer's Cafe cleaning up for just a few dollars a week" (App., p. 46).

The prosecutor advised the jury that in determining who is telling the truth they should ascertain "who would be most likely to tell you the truth" (App., p. 47). After explaining that Mr. Maddox had nothing to gain "by making a charge" against petitioner and "by coming to court," the prosecutor rhetorically asked, "What reason would he [Mr. Maddox] have to tell you other than the truth?" (App., p. 47). Then the

prosecutor proffered the following analysis of Michael Taylor's motivation:

> Now, look at this defendant. What reason would he have to tell you the truth? Not any because he knows if he tells you what he did you're going to give him what he deserves, a trip to the penitentiary (App., p. 47).

Concluding his argument, the prosecutor told the jury:

> In closing, he's got a very simple philosophy. This defendant says what's mine is mine; I will keep it. What's yours is mine; I will take it. That's not only his philosophy, that's what he practices. That's what he did . . . (App., p. 49).

Contrary to his plea, petitioner was found guilty of the charged offense and sentenced to confinement in the penitentiary for five years (App., pp. 9-10, 50). Final judgment was entered against petitioner on June 22, 1976 (App., p. 11). Notice of appeal was filed on June 24, 1976 (App., p. 13).

Petitioner in his direct appeal to the Court of Appeals of Kentucky, the state's intermediate appellate court, raised, *inter alia*, the trial court's failure to instruct on the presumption of innocence and the indictment's lack of evidentiary-value.

On April 1, 1977 the Kentucky Court of Appeals in a published opinion, with one judge dissenting, affirmed the conviction in petitioner's case, but remanded the case to the trial court for a resentencing due to the trial judge's failure to order the statutorily mandatory presentencing investigation (App., p. 56). Petitioner's timely motion for discretionary review as overruled by the Supreme Court of Kentucky on June 29, 1977. Consequently, the Court of Appeals of Kentucky on July 11, 1977 issued the mandate in petitioner's case.

SUMMARY OF ARGUMENT

I.

The presumption of innocence in favor of the accused, although not articulated in the Constitution, is a constitutionally rooted component of a fair trial in our criminal justice system. Due process guarantees the enforcement of the presumption of innocence in all criminal cases.

Despite the well established principle that a presumption of innocence in favor of the accused is constitutionally mandated, Michael Taylor's request for an instruction on the presumption was denied by the trial court. Kentucky's appellate courts have repeatedly sanctioned the denial of an instruction on the presumption of innocence.

By refusing the defense request for this instruction, the trial court in the instant case insured that Michael Taylor would be deprived of the protection this presumption affords anyone accused of crime.

Kentucky's contention that a trial judge may properly deny a defense request for an instruction on the presumption of innocence as long as the jury is instructed on reasonable doubt was rejected as early as 1895 by this Court. It has long been recognized by the federal courts, legal scholars, and numerous state courts that while the presumption of innocence is similar to the reasonable doubt standard in reminding the jury that the prosecutor bears the burden of proof, the functions of these two constitutional precepts are clearly distinguishable and independently necessary.

As universally recognized, an instruction on the presumption of innocence conveys to the jury a special meaning which affords the accused additional protection not contained in the rule concerning the burden of proof. The presumption performs a dual function in the criminal justice system. First, it serves to remind the jury that the prosecution bears the burden of persuasion which can only be met by proof establishing the accused's guilt beyond a reasonable doubt. Second, the presumption performs a purging function by cautioning the jury not only to remove from their minds all the suspicion which arises from the arrest, indictment, and arraignment, but also to reach their verdict solely on the basis of the evidence admitted at trial.

Precedent indicates that a trial court's failure to instruct on the presumption of innocence, when requested, constitutes reversible error without assessing any other factors in the trial. But under any test Michael Taylor's state conviction must be overturned since the trial judge's refusal to give the requested instruction violated his due process right to the presumption of innocence and so infected the entire trial that the resulting conviction violates due process.

Analysis of the other components of petitioner's trial demonstrates that the testimony of the witnesses, the argument of counsel, and even the instructions given by the judge magnified rather than minimized the prejudice inflicted on Michael Taylor by the court's refusal to give the defense requested instruction on the presumption of innocence. Obvious deficiencies in the trial court's instructions undermined Michael Taylor's right to the presumption of innocence until proven guilty

beyond a reasonable doubt. The prosecutor's closing argument vigorously assailed the presumption of innocence, defendants in general, petitioner's character, his youth, his economic status, his credibility, and even his personal philosophy (as postulated by the prosecutor). Deprived of a prophylactic instruction on the presumption of innocence, Michael Taylor was convicted by a jury that had been subjected to the prosecutor's discourse on an implicit theme – the presumption of guilt.

Ultimately, it is axiomatic that the fundamental protection of the presumption of innocence in favor of an accused will be eviscerated if trial judges are free, even in the face of a defense request, to refuse to instruct the jury on this legal principle.

Accordingly, the decision below to deny Michael Taylor the protection of an instruction on the presumption of innocence was plainly inconsistent with that constitutionally rooted principle and so infected his trial and conviction as to deny petitioner due process under the Fourteenth Amendment.

II.

To implement the fundamental protection of the presumption of innocence, due process requires that courts must be alert to factors that undermine the fairness of the fact-finding process in criminal trials.

Throughout the trial in the instant case the prosecution's overemphasis of the indictment, whether intentional or inadvertent, created the very real risk that the jury would erroneously view the indictment as

evidence of Michael Taylor's guilt of the charged offense. In this context, the trial judge's refusal to give the defense requested instruction on the indictment's lack of evidentiary value diluted the constitutional principle that guilt is to be established by probative evidence and beyond a reasonable doubt.

Courts justifiably have been concerned that overemphasis of the indictment may lead the jury to construe the indictment as evidence of guilt of the accused. Consequently, although the reading of the indictment to the jury is not an improper practice, a defendant in most jurisdictions is entitled, upon request, to an instruction that the indictment is only a formal charge and not evidence of guilt.

In the absence of an instruction on the presumption of innocence, the trial judge's decision to deprive Michael Taylor of the protection of an instruction on the indictment's lack of evidentiary value constituted a denial of due process, sufficient in magnitude to necessitate a reversal of petitioner's conviction.

AGRUMENT

I.

PETITIONER WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW BY THE REFUSAL OF THE TRIAL COURT TO GIVE AN INSTRUCTION ON THE PRESUMPTION OF INNOCENCE WHEN PETITIONER'S COUNSEL REQUESTED AND TENDERED SUCH AN INSTRUCTION.

"The right of a fair trial is a fundamental liberty secured by the Fourteenth Amendment. . . . The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice." *Estelle v. Williams*, 425 U.S. 501, 503 (1976). Long ago, this Court in *Coffin v. United States*, 156 U.S. 432 (1895), declared:

> The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law. *Id.*, 156 U.S. at 453, cited with approval in *Estelle v. Williams, supra.*

Indeed, the presumption of innocence is the "bedrock" principle of this country's criminal law. *In Re Winship*, 397 U.S. 358, 363 (1970).

The presumption of innocence "is predicated not upon any express provision of the federal constitution, but upon ancient concepts antedating the development of the common law." *Reynolds v. United States*, 238 F.2d 460, 463 (9th Cir. 1956). The presumption of

innocence "is one of the fundamentals of the law" and "is not to be minimized or denied to any one accused of crime." *Dodson v. United States*, 23 F.2d 401, 403 (4th Cir. 1928). It "was developed for the purpose of guarding against the conviction of an innocent person." *Reynolds v. United States, supra* at 463.

Despite the well established principle that a presumption of innocence in favor of the accused is constitutionally required, Michael Taylor's request to have the jury in his case instructed on the presumption was denied at the trial level and that denial was upheld by the appellate courts of Kentucky.

In the case *sub judice* the prosecution's only evidence was the uncorroborated testimony of one witness, Mr. Maddox, the victim of the alleged robbery, and the defense case consisted of but one witness, Michael Taylor, the defendant (App., pp. 24, 31). With the evidence in this posture, petitioner's counsel requested the trial judge to instruct on the presumption of innocence and tendered to the trial judge an instruction to that effect (App., pp. 39-40, 53).[5] The trial court

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[5]The presumption of innocence instruction tendered by defense counsel in the instant case reads as follows:

> The law presumes a defendant to be innocent of a crime. Thus a defendant, although accused, begins the trial with a "clean slate". That is, with no evidence against him. The law permits nothing but legal evidence presented before a jury to be considered in support of any charge against the accused. So the presumption of innocence alone is sufficient to acquit a defendant, unless you are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all of the evidence in the case (Defense Instruction No. 4; App., p. 53).

refused to give the "presumption of innocence" instruction tendered by the defense and limited its jury instructions to the substantive offense of second degree robbery, reasonable doubt, and the necessity of a unanimous verdict (App., pp. 39-40).

Rejecting on appeal the argument that Michael Taylor "was substantially prejudiced by the trial court's failure to instruct on presumption of innocence," the Kentucky Court of Appeals observed that "[t]he well established law of Kentucky has been that as long as the trial court instructs the jury on reasonable doubt an instruction on the presumption of innocence is not necessary." *Taylor v. Commonwealth*, Ky. App., 551 S.W.2d 813, 813-814 (1977). The Court of Appeals of Kentucky concluded, "We find no reason to change the established law on this point." *Id.* at 814.

In support of the contention that an instruction on reasonable doubt renders an instruction on the presumption of innocence "not necessary," the Court of Appeals of Kentucky cited the decisions in *Mink v. Commonwealth*, 228 Ky. 674, 15 S.W.2d 463 (1929), and *Swango v. Commonwealth*, 291 Ky. 690, 165 S.W.2d 182 (1942).

In *Mink v. Commonwealth*, 228 Ky. 674, 15 S.W.2d 463, 464 (1929), when the appellant "suggested that the trial court should have instructed the jury that the defendant was presumed to be innocent until his guilt was shown beyond a reasonable doubt," the Kentucky court rejected that argument because "[t]he usual instruction on reasonable doubt, substantially following the language . . .of the [Kentucky] Criminal Code, was given, and that was all to which the defendant was entitled." Citing *Brown v. Commonwealth*, 198 Ky.

663, 249 S.W. 777 (1923), the *Mink* court enunciated that "the court should not tell the jury that the law presumes the innocence of a defendant." *Mink v. Commonwealth, supra*, 15 S.W.2d at 464.

Significantly, in *Brown v. Commonwealth, supra*, the trial judge had given the following instruction on reasonable doubt: "The law presumes the defendant to be innocent until proven guilty, and, if you have a reasonable doubt of his having been so proven, you will find him not guilty." Although admitting that "this instruction fairly presents the law," the *Brown* court condemned its use because "it is more favorable to the defendant than he was entitled to have." *Id.*, 249 S.W. at 778.

In 1942 the Kentucky Court in *Swango v. Commonwealth, supra*, again found no error in the trial court's failure "to instruct the jury, in effect, that the law presumes the innocence of the accused." *Id.*, 165 S.W.2d at 183. Reasoning that "the only instruction of the character authorized is one as to reasonable doubt," the *Swango* court cautioned the trial judiciary that "an instruction such as suggested by appellant is unauthorized *as being too favorable to the defendant.*" *Id.* *See Commonwealth v. Stites*, 190 Ky. 402, 227 S.W. 574, 576 (1921).

Predicating its entire analysis on the rationale employed in prior state court decisions, the Kentucky Court of Appeals in the case *sub judice* affirmed the proposition that a trial judge in Kentucky may properly deny a defense request for an instruction on the presumption of innocence as long as the jury is instructed on reasonable doubt.

In 1895 this Court in *Coffin v. United States, supra*, analyzed the exact issue presented in this assignment of error. The trial judge in the cited case "refused to instruct as to the presumption of innocence," but "instructed fully on the subject of reasonable doubt." *Id.* at 453. The government argued on appeal that the reasonable doubt charge obviated the need for an instruction on the presumption of innocence. Consequently, the question presented in *Coffin* was "whether the charge that there cannot be a conviction unless the proof shows guilt beyond a reasonable doubt so entirely embodies the statement of presumption of innocence as to justify the court in refusing, when requested, to inform the jury concerning the latter." *Id.* at 457. In holding that the refusal to give the requested instruction was reversible error, this Court explained:

> The inevitable tendency to obscure the results of a truth, when the truth itself is forgotten or ignored, admonishes that the protection of so vital and fundamental a principle as the presumption of innocence be not denied, when requested, to any one accused of crime. *Id.* at 460.

The requirement of a presumption of innocence charge was specifically reaffirmed in *Cochran v. United States*, 157 U.S. 286 (1895), when this Court explained:

> In the case under consideration, counsel asked for a specific instruction upon the defendants' presumption of innocence, and we think it should have been given. The Coffin Case is conclusive in this particular, and it results that the judgment of the court below must be reversed, and the case remanded, with instructions to grant a new trial. *Id.* at 300.

It should be noted that in *Coffin* this Court concluded that "the presumption of innocence is evidence in favor of the accused, introduced by the law in his behalf," while "reasonable doubt" is "the condition of mind produced by the proof resulting from the evidence in the cause." *Coffin v. United States, supra* at 460. According to the ratiocination in *Coffin*, reasonable doubt "is the result of the proof, not the proof itself, whereas the presumption of innocence is one of the instruments of proof, going to bring about the proof from which reasonable doubt arises." *Id.* After describing the presumption of innocence as "a cause" and reasonable doubt as "an effect," this Court observed, "To say that the one is the equivalent of the other is therefore to say that legal evidence can be excluded from the jury, and that such an exclusion may be cured by instructing them correctly in regard to the method by which they are required to reach their conclusion upon the proof actually before them." *Id.* This exact line of analysis was reiterated in *Cochran v. United States, supra* at 300.

However, the exposition and reasoning delineated in *Coffin* and repeated in *Cochran* was given little consideration and no mention in *Allen v. United States*, 164 U.S. 492, 500 (1896), where the alleged error centered on "the refusal of the court to charge the jury that where there is a probability of innocence, there is a reasonable doubt of guilt." This Court in *Allen* succinctly delimited the holding in *Coffin* to the principle "that a refusal of the court to charge the jury upon the subject of the presumption of innocence was not met by a charge that they could not convict unless the evidence showed guilt beyond a reasonable doubt."

Allen v. United States, supra at 500. Significantly, the trial judge in *Allen* had charged the jury that "a party starts into trial, though accused by the grand jury with the crime of murder, or any other crime, with the presumption of innocence in his favor" and that the presumption "is driven out of the case when the evidence shows beyond a reasonable doubt that . . . a crime has been committed." *Id.* Since the jury had been "charged upon the subject of the presumption of innocence," the trial court "could not be required to repeat the charge in a separate instruction at the request of the defendant." *Allen v. United States, supra* at 500.

By 1897 the analysis propounded in *Coffin* had generated a hybrid issue involving the defense's right to a specific charge on the presumption of innocence which described the presumption as evidence. In *Agnew v. United States,* 165 U.S. 36 (1897), the trial judge instructed the jury that "[t]he defendant is presumed to be innocent of all the charges against him until he is proven guilty by the evidence submitted to you" and that "[t]his presumption remains with the defendant until such time, in the progress of the case, that you are satisfied of the guilt beyond a reasonable doubt," but refused to give the following instruction requested by the defense:

> "Every man is presumed to be innocent until he is proved guilty, and this legal presumption of innocence is to be regarded by the jury in this case as a matter of evidence, to the benefit of which the party is entitled. This presumption is to be treated by you as evidence, giving rise to resulting proof, to the full extent of its legal efficacy." *Id.* at 51.

Rejecting the defendant's allegation of error, this Court in *Agnew* held that "[t]he instruction given was quite correct, and substantially covered the instruction refused." *Agnew v. United States, supra* at 51-52. Despite this summary dispatch of the assigned error, this Court gratuitously added that the trial court "might well have declined to give" the defense tendered instruction "on the ground of the tendency of its closing sentence to mislead." *Id.* at 52.

After quoting a passage from *Coffin* which designated the presumption of innocence to be "evidence in favor of the accused," the *Agnew* decision emphasized that in *Coffin* the trial court's charge "was thought not to have given due effect to the presumption of innocence" while in *Agnew* there "was no failure" of the trial judge "to state" the presumption of innocence to the jury. *Agnew v. United States, supra* at 52. This Court concluded that "the giving of the instruction asked would have tended to obscure what had already been made plain." *Id.*[6]

[6] According to Wigmore, after the *Coffin* decision declared the presumption of innocence to be evidence in favor of the accused, "[a] notable academic deliverance by the master in the law of Evidence, [Professor James Bradley Thayer], laid bare the fallacy with keen analysis" and "it was soon afterwards discarded in the Court of its origin." 9 J. WIGMORE, EVIDENCE §2511 (3rd ed. 1940).

Amplifying this comment, Wigmore observes that the opinion in *Agnew v. United States,* 165 U.S. 36 (1897), was "published subsequently to a notable lecture on the Presumption of Innocence, apropos of the Coffin case," delivered by Professor Thayer at Yale University in 1896. "in which the history of the presumption was carefully examined, its meaning acutely expounded and the fallacies of the Coffin case exposed in detail." 9 Wigmore, *Evidence* §2511 n.5. That lecture was reprinted in J. THAYER, PRELIMINARY TREATISE ON EVIDENCE 551 app. B (1898).

Similarly in *Holt v. United States*, 218 U.S. 245, 253 (1910), the defendant excepted to the trial court's refusal to give a requested instruction which included the statement that "[t]he presumption of innocence is evidence in the defendant's favor." However, the trial judge had instructed the jury, "The law presumes innocence in all criminal prosecutions. We begin with a legal presumption that the defendant, although accused, is an innocent man." *Id.* This Court rejected the allegation of error, noting that the trial court's instruction "was correct, and avoided a tendency in the closing sentence quoted from the request to mislead." *Id.* at 253, citing with approval *Agnew v. United States*, *supra*. Here again this Court turned its back on the analysis and exposition of *Coffin* which had expressly classified that presumption of innocence as evidence in favor of the accused.

The decisions in *Agnew* and *Holt*, both *supra*, affirmed judicial refusal to instruct the jury in the language of *Coffin* that the presumption of innocence is evidence to be considered in the accused's favor. In both cases, the trial court had instructed the jury on the presumption of innocence, though not in the exact language requested by trial counsel. On appeal each defendant claimed error in the trial judge's refusal to instruct the jury to consider the presumption of innocence as evidence in favor of the accused. This Court in both *Agnew* and *Holt* held that an instruction, such as those requested, was unnecessary and at least potentially misleading. *United States v. Fernandez*, 496 F.2d 1294, 1298 (5th Cir. 1974). At least two federal circuit courts have interpreted the holdings in *Agnew* and *Holt* "as negating the statement in *Coffin* that the

presumption of innocence is evidence to be considered in favor of the accused." *United States v. Fernandez*, *supra* at 1298, citing *United States v. Nimerick*, 118 F.2d 464 (2nd Cir. 1941), and *Harrell v. United States*, 220 F.2d 516 (5th Cir. 1955).[7]

But the *Agnew* and *Holt* decisions have in no way undermined the basic holding of *Coffin* and its progeny that "the protection of so vital and fundamental a principle as the presumption of innocence be not denied, when requested, to any one accused of crime." *Coffin v. United States*, *supra* at 460-461. "Of unimpaired vitality is at least the *Coffin* holding that it is prejudicial error not to instruct on the presumption when requested." *United States v. Fernandez*, *supra* at 1298.[8]

As recently as 1976 this Court reiterated the teaching of *Coffin* that the "presumption of innocence" is "the undoubted law" and "its enforcement lies at the foundation of the administration of our criminal law." *Estelle v. Williams*, *supra* at 503, citing *Coffin v. United States*, *supra* at 453. Certainly the most basic mode of enforcing the presumption of innocence is to instruct the jury in every criminal trial of the presumption of innocence in favor of the accused. For as *Coffin* teaches, there exists an "inevitable tendency to obscure

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[7] Numerous state courts have rejected the concept that the presumption of innocence is evidence. *Commonwealth v. DeFrancesco*, 248 Mass. 9, 142 N.E. 749, 34 A.L.R. 937 (1924).

[8] At least one federal circuit has held that the failure to instruct *sua sponte* on the presumption of innocence can rise to the level of plain error requiring reversal. *McDonald v. United States*, 284 F.2d 232 (D.C. Cir. 1960).

the results of a truth, when the truth itself is forgotten or ignored." *Coffin v. United States, supra* at 460.

In 1895 this Court in *Coffin* held that a refusal to instruct the jury on the presumption of innocence "was not met by a charge" on the reasonable doubt standard of proof. *Allen v. United States, supra* at 500. That holding has remained viable. "[I]t is settled that failure to charge on the presumption of innocence is not cured by a correct charge on the burden of proof." *Dodson v. United States, supra* at 403.

Even those legal scholars who note technical imperfections in the concept recognize that the phrase "presumption of innocence" means that the prosecution must produce evidence to prove an accused guilty beyond a reasonable doubt. *Pitts v. State*, Md. App., 374 A.2d 632, 634 (1977). For example, Wigmore in his treatise writes that "[t]he 'presumption of innocence' is in truth merely another form of expression for a part of the accepted rule for the burden of proof in criminal cases, *i.e.*, the rule that it is for the prosecution to adduce evidence and to produce persuasion beyond a reasonable doubt." 9 J. WIGMORE, *supra* at 407. Although emphasizing that the presumption of innocence "says nothing" as to "the measure of persuasion," Wigmore notes that, as to the prosecutor's obligation to adduce evidence, the presumption "implies . . . that the accused (like every other person on whom the burden of proof does not lie) may remain inactive and secure until the prosecution has taken up its burden and produced evidence and effected persuasion." *Id.* Ultimately, according to Wigmore, "to say . . . that the opponent of a claim or a charge is presumed not guilty is to say in another form that the proponent of the claim or charge must evidence it." *Id.*

McCormick, like Wigmore, has emphasized that since the "presumption of innocence" is not actually a presumption, the phrase is technically inaccurate. According to McCormick, "[a]ssignments of the burdens of proof prior to trial are not based on presumptions" because "[b]efore trial no evidence has been introduced from which other facts are to be inferred." McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE §342 at 805 (2nd ed. 1972). Nevertheless, in certain instances, the rules assigning the burden of proof before trial "are incorrectly referred to as presumptions" and "the most glaring example of this mislabeling is the 'presumption of innocence' as the phrase is used in criminal cases." *Id.* McCormick reasons that "[t]he phrase is probably better called the 'assumption of innocence' in that it describes our assumption that, in the absence of contrary facts, it is to be assumed that any person's conduct upon a given occasion was lawful." *Id.* at 805-806.[9]

Despite the technical inaccuracy of the phrase, McCormick acknowledges that the "presumption of innocence" has been utilized by judges "as a convenient introduction to the statement of the burdens upon the prosecution, first of producing evidence of the guilt of the accused and, second, of finally persuading the jury or judge of his guilt beyond a reasonable doubt." *Id.* at 806.

[9] "In the first place, the so-called presumption of innocence is not, strictly speaking, a presumption in the sense of an inference deduced from a given premise. It is more accurately an assumption which has for its purpose the placing of the burden of proof upon anyone who asserts any deviation from the socially desirable ideal of good moral conduct." *Carr v. State*, 192 Miss. 152, 4 So.2d 887, 888 (1941).

Notwithstanding these technical criticisms, both Wigmore and McCormick advocate the continued use of the phrase "presumption of innocence" because it "conveys to the jury a special meaning which affords the accused additional protection not contained in the rule concerning the burden of proof." *Pitts v. State*, *supra* at 635.

Wigmore advises that "in a criminal case the term [presumption of innocence] does convey a special and perhaps useful hint, over and above the other form of the rule about the burden of proof, in that it cautions the jury to put away from their minds all the suspicion that arises from the arrest, the indictment, and the arraignment, and to reach their conclusion solely from the legal evidence adduced." 9 J. WIGMORE, *supra* at 407.

Expanding this line of analysis, Wigmore explains that, while the presumption of innocence, like the rule about burden of proof, requires "the prosecution by evidence to convince the jury of the accused's guilt," the presumption also "conveys for the jury a special and additional caution (which is perhaps only an implied corollary to the other) to consider, in the material for their belief, *nothing but the evidence, i.e.*, no surmises based on the present situation of the accused." *Id.*, emphasis in original. In essence, then, the "presumption of innocence" instruction "is particularly a warning not to treat certain things improperly as evidence." *Id.* at 409. Realistically, Wigmore warns that "[t]his caution is indeed particularly needed in criminal cases." *Id.* at 407.

Assenting to Wigmore's evaluation, McCormick acknowledges the value of the "presumption of

innocence" instruction and concludes that "it should not be discarded" because "[l]ike the requirement of proof beyond a reasonable doubt, it at least indicates to the jury that if a mistake is to be made it should be made in favor of the accused." McCORMICK, *supra* at 806.[10]

Even Professor Thayer, in his 1896 lecture on the presumption of innocence, conceded that "it may be true, as a general proposition, that the right should be maintained to have the presumption of innocence, specifically, and by name, drawn to the attention of the jury" because "certainly" such a specific judicial declaration "would draw pointed attention to those dangers of injury to the accused from mere suspicion, prejudice, or distrust, and to those other grounds of policy which make such judicial warnings important." J. THAYER, *supra* at 572.

Another factor evidencing the fundamental nature of the presumption of innocence is the emphasis that state courts have placed on this legal precept. Numerous state appellate courts have recognized that the failure of the

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[10]This reflects a change in view from Dean McCormick's initial text where the author commented:

> It seems, however, that the standard instruction on the state's burden of proving the crime beyond a reasonable doubt amply covers these points. If not they should be covered specifically, and not by a phrase which can only suggest to a juror that there is some inherent probability that a person tried for a crime is innocent. The instruction on "presumption of innocence" should, it seems, be regarded merely as a traditional but unnecessary amplification of the instructions on the prosecution's burdens of evidence and of persuasion beyond a reasonable doubt. McCORMICK, THE LAW OF EVIDENCE 649 (1954).

trial judge to instruct on the presumption of innocence constitutes a constitutional error mandating reversal of the defendant's conviction.[11] For example, the Supreme Court of Appeals of West Virginia has proclaimed that "[i]t is a fundamental right of a defendant to have the jury instructed as to the presumption of innocence and we have repeatedly held it to be reversible error for a trial court to fail to do so." *State v. Cokeley*, W. Va., 226 S.E.2d 40, 43 (1976). Indeed, in Virginia, "[t]he failure of the trial court to adequately instruct the jury on the presumption of innocence when such an instruction is requested is reversible error." *Allen v. Commonwealth*, Va., 180 S.E.2d 513, 516 (1971); *Whaley v. Commonwealth*, Va., 200 S.E.2d 556 (1973).

Addressing this same question, the Supreme Court of Colorado, sitting en banc, observed that the "failure to instruct on the presumption of innocence constitutes a denial of due process of law" which "requires that the defendant be granted a new trial." *People v. Hill*, Colo., 512 P.2d 257, 258-259 (1973).

In Georgia, the failure of a trial judge in a criminal case to instruct the jury on the presumption of innocence is error requiring the grant of a new trial because "[t]his presumption is a fundamental protection afforded an accused and is based upon an established principle of common law." *Ealey v. State*, 141 Ga. App. 94, 232 S.E.2d 620, 620-621 (1977).

[11] "According to most courts, an instruction that the defendant's guilt must be established beyond a reasonable doubt is not regarded as the equivalent of an instruction on the presumption of innocence; and hence, if requested, the latter instruction must be given." 4 C. TORCIA, WHARTON'S CRIMINAL PROCEDURE §541 at 20 (12th ed. 1976).

Noting that the presumption of innocence "is a cardinal principle which has special significance in criminal cases because of the nature of these proceedings," the Court of Appeals of New Mexico held "[i]t is error to fail to instruct the jury on the presumption of innocence, if defendant requests an instruction thereon." *State v. Henderson*, 81 N.M. 270, 466 P.2d 116, 118 (1970).

According to the Florida appellate courts, "any proper understanding of the State's burden of proof in a criminal case must begin with an appreciation of" the presumption of innocence. *Reynolds v. State*, Fla. App., 332 So.2d 27, 29 (1976). Consequently, the trial judge's failure to instruct completely on the presumption of innocence when requested required reversal of the defendant's conviction. *Id.*

Recognizing that the presumption of innocence is "fundamental to a fair trial," the Supreme Court of Washington held the complete failure of the trial court to instruct *sua sponte* on the presumption of innocence constituted reversible error. *State v. McHenry*, Wash., 558 P.2d 188, 190 (1977).

Because the presumption of innocence is a "cardinal principle" with "special significance in criminal cases," the Supreme Court of Illinois has recognized that "[i]t is error to fail to instruct the jury on this presumption" if requested. *People v. Long*, 407 Ill. 210, 95 N.E.2d 461, 463 (1950).

In Massachusetts the refusal to instruct on the presumption of innocence is reversible error even though the trial court instructs the jury that indictment and custody are not to be held against the defendant and that the verdict can not be based on suspicion.

Commonwealth v. Madeiros, 255 Mass. 304, 151 N.E. 297 (1926).

The Supreme Court of Alabama has consistently ruled that "in every criminal case . . . the presumption of innocence . . . should be fully presented in the oral charge." *Guenther v. State*, Ala., 213 So.2d 679, 684 (1968).

In Texas the trial court must charge as to the presumption of innocence when requested. *Bennett v. State*, Tex. Crim., 396 S.W.2d 875 (1965); *Brown v. State*, Tex. Crim., 396 S.W.2d 876 (1965). Texas courts have concluded that the presumption of innocence "is the most valuable of the defendant's rights and . . . that a charge upon this subject is essential in every criminal case." *Bennett v. State, supra.* Similarly the Supreme Court of Indiana has long held that a refusal to instruct on the presumption of innocence, when requested, denies an accused a fair trial and constitutes reversible error. *Jalbert v. State*, 200 Ind. 380, 165 N.E. 522, 523-524 (1928).

The following sampling of cases also support petitioner's contention: *People v. McClintic*, Mich., 160 N.W. 461 (1916); *People v. Leavitt*, 301 N.Y. 113, 92 N.E.2d 915 (1950); *State v. Stoddard*, Mont., 412 P.2d 827 (1966); *State v. Coleman*, Mo., 460 S.W.2d 719 (1970); and *Gilleylen v. State*, Miss., 255 So.2d 661 (1971).

The contention that instructions relating to reasonable doubt obviate the need for an instruction on presumption of innocence has also been rejected in numerous state courts. In *People v. Long, supra*, 95 N.E.2d at 463 the Supreme Court of Illinois explained that "in the absence of an instruction as to the

presumption of innocence, instructions relating to reasonable doubt of guilt have the effect of depriving a defendant of his presumption of innocence during the phase of the trial when the jury is considering all the evidence." Instructions pertaining to the reasonable-doubt standard "concern a degree of guilt, are not compatible with a presumption of innocence, and therefore, when standing alone, deprive a defendant of the presumption of innocence." *Id.* According to the *Long* court, this analysis is "the generally accepted view of both the Federal courts and the courts of last resort in other jurisdictions." *Id.*

Expressing this same rationale, the Supreme Court of Virginia has recognized that the "presumption of innocence is 'a landmark of the law' and, as such, is not sufficiently met by a reasonable doubt instruction." *Whaley v. Commonwealth, supra* at 558. *See State v. Henderson* and *People v. Hill*, both *supra.*

All of these factors coalesce to establish the presumption of innocence as a requirement of due process. Expressions in numerous opinions of this Court indicate that the presumption of innocence is the "bedrock" principle of "our criminal law." *In Re Winship*, 397 U.S. 358, 363 (1970). Legal scholars acknowledge the important and unique function of the presumption of innocence in a criminal trial. Even the various state courts accept the presumption of innocence as an essential legal principle and a fundamental protection of every accused.

The presumption of the innocence of an accused "attends him throughout the trial, and has relation to every fact that must be established in order to prove his guilt beyond a reasonable doubt." *Kirby v. United*

States, 174 U.S. 47, 55 (1899). This presumption "continues to operate until overcome by proof of guilt beyond a reasonable doubt." *United States v. Fleischman*, 339 U.S. 349, 363 (1950). It "is not to be confused with the burden of proof, which is a rule affecting merely the time and manner of proof." *Id.*

While the presumption of innocence is similar to the reasonable doubt standard in reminding the jury that the prosecutor bears the burden of proof, their functions are both clearly distinguishable and independently necessary. In *United States v. Thaxton*, 483 F.2d 1071 (5th Cir. 1973), the court discussed this exact point:

> The presumption of innocence performs a two-fold function in our criminal process. First, as a corollary to the standard of proof in a criminal case, it serves to remind the jury that the prosecution bears the burden of persuading the fact-finder of the defendant's guilt beyond a reasonable doubt and that in the absence of such proof that the jury must acquit. Second, "it cautions the jury to put away from their minds all the suspicion that arises from the arrest, the indictment, and the arraignment, and to reach their conclusion solely from the legal evidence adduced." 9 Wigmore on Evidence §2511, at 407 (3d ed. 1940). *The charge usually given in both state and federal courts informs the jury of both the "persuasion" and "purging" functions of the presumption. Id.* at 1073; emphasis added.

The "purging" function of the presumption of innocence instruction was absolutely essential in the case *sub judice*. The evidence in the case at bar amounted to nothing more than one man's word against that of another. In such a situation, a jury may

discredit the testimony of the defendant simply because he is on trial. Indeed, the prosecutor in the case at bar even manipulated that potential prejudice in his closing argument when he said:

> Now, look at this defendant. What reason would he have to tell you the truth? Not any because he knows if he tells you what he did you're going to give him what he deserves, a trip to the penitentiary (App., p. 47).

Under these circumstances, petitioner was entitled to the protection of the "presumption of innocence" instruction. The failure to instruct the jury in the case *sub judice* on the "constitutionally rooted presumption of innocence" was a clear denial of due process. *Cool v. United States*, 409 U.S. 100, 104 (1972).

In his dissenting opinion in the case at bar, Judge Wilhoit criticized the majority's position on the presumption of innocence issue and offered the following explanation:

> It strikes me as bordering on the fatuous to say that a jury must be instructed on one of the most basic principles of our criminal law but not the other. The reason given for this anomaly in Kentucky jurisprudence has heretofore been that an instruction on the presumption of innocence is "too favorable to the defendant", *Swango v. Commonwealth*, 291 Ky. 690, 165 S.W.2d 185 (1942). Most of those rights embodied in the modern concept of due process are "favorable to the defendant", but that is their very reason for existence. *Taylor v. Commonwealth, supra* at 814 (Wilhoit, J., dissenting).

Judge Wilhoit emphasized that since "[n]ot every person charged in a criminal complaint or indicted by a

grand jury is guilty of a crime . . . our system has built in certain safeguards to protect the innocent," one of which "is the so-called presumption of innocence of a criminal defendant." *Id.*

Noting the pragmatic implications of the presumption of innocence instruction, Judge Wilhoit observed:

> There is certainly no such presumption in the minds of jurors about to try a case. In fact, by the time the indictment is read to the jurors, the opposite presumption is likely to be present in their minds. The law builds in the presumption of innocence, but it is of no use to the defendant if the jury is never told about it. *Id.*

Although acknowledging that "an instruction on reasonable doubt does much the same thing that one on the presumption of innocence would do," Judge Wilhoit expressed his belief that "there is a subtle distinction between the two instructions and one does not completely perform the job of the other." *Id.* at 815 citing 9 J. WIGMORE, EVIDENCE §2511 (3d ed. 1940).

Petitioner notes that in the decisions of *Coffin* and *Cochran*, both *supra*, this Court held the trial court's failure to instruct on the presumption of innocence, when requested, constituted reversible error without assessing any other factors in the trial. Following this precedent, federal circuit courts have likewise reversed the defendant's conviction whenever the federal district judge has refused a defense request to instruct on the presumption of innocence without regard for other aspects of the case. The language of *Coffin* seems to indicate that reversal is inevitably mandated when a defendant's request for a presumption of innocence instruction is denied. *Coffin v. United States, supra* at 460.

Nevertheless, petitioner submits that under any test his state court conviction must be overturned since the trial court's refusal to give the requested instruction "violated" his right to the presumption of innocence "which was guaranteed to the defendant by the Fourteenth Amendment." *Cupp v. Naughten*, 414 U.S. 141, 146 (1973). Furthermore, that refusal to instruct on the presumption "so infected the entire trial that the resulting conviction violates due process." *Id.* at 147.

In determining the effect of either the inclusion or omission of an instruction on the validity of a criminal conviction, this Court has recognized "the well-established proposition that a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Cupp v. Naughten, supra* at 146-147 (1973), citing *Boyd v. United States*, 271 U.S. 104, 107 (1926); *Henderson v. Kibbe*, ____ U.S. ____, 97 S.Ct. 1730, 1736 n.10 (1977). This proposition "does not mean that an instruction by itself may never rise to the level of constitutional error." *Id.*, citing *Cool v. United States*, 409 U.S. 100 (1972). However, "it does recognize that a judgment of conviction is commonly the culmination of a trial which includes testimony of witnesses, argument of counsel, receipt of exhibits in evidence, and instruction of the jury by the judge." *Cupp v. Naughten, supra* at 147. Consequently, "not only is the challenged instruction but one of many such instructions, but the process of instruction itself is but one of several components of the trial which may result in the judgment of conviction." *Id.* at 147; *Henderson v. Kibbe, supra*, 97 S.Ct. at 1736 n.10.

"An appraisal of the significance of an error in the instructions to the jury requires a comparison of the instructions which were actually given with those that should have been given." *Henderson v. Kibbe, supra*, 97 S.Ct. at 1736.

The instruction on the presumption of innocence submitted by Michael Taylor's trial attorney appears free of any improper or misleading statements of law. At no time did either the trial judge or the state appellate court suggest that the tendered instruction was rejected because it was defective. This is understandable since the tendered instruction is virtually a verbatim copy of the presumption of innocence charge contained in 1 E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE & INSTRUCTIONS §1101 at 205 (2d ed. 1970).[12] That particular form instruction was cited in *United States v. Thaxton, supra* at 1073 n.1, as an example of an approved instruction on the presumption of innocence. The defense tendered instruction does not appear susceptible to criticism on the basis of either language, construction or content.

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[12]The presumption of innocence instruction in 1 DEVITT & BLACKMAR, *supra* at 205 reads as follows:

> The law presumes a defendant to be innocent of crime. Thus a defendant, although accused, begins the trial with a "clean slate" – with no evidence against him. And the law permits nothing but legal evidence presented before the jury to be considered in support of any charge against the accused. So the presumption of innocence alone is sufficient to acquit a defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all of the evidence in the case.

In the case at bar the instructions given by the trial judge were sparse. The trial court instructed on the substantive offense of second degree robbery, the definition of reasonable doubt, and the necessity of a unanimous verdict (App., p. 40).

The trial judge in the instant case commenced his instruction on the elements of the substantive offense with the direction, "you will find the defendant guilty under this instruction if and only if you believe from the evidence *beyond a reasonable doubt* all of the following" (App., p. 40; emphasis added). At no point in the remainder of the instruction on the substantive offense did the court mention the presumption of innocence or again refer to the reasonable doubt standard.

Next the trial judge gave a two-part reasonable doubt instruction. Initially the trial court informed the jury, "if upon the whole case you have *a reasonable doubt as to the defendant's guilt* you will find him not guilty" (App., p. 40; emphasis added). In the latter portion of this instruction, the trial judge defined the term "reasonable doubt" as "a substantial doubt, a real doubt, in that you must ask yourself not whether a better case might have been proved but whether after hearing all the evidence you actually doubt that the defendant is guilty" (App., p. 40).

Concluding his instructions, the trial judge explained that "the verdict of the jury must be unanimous" and "signed" by the foreman (App., p. 40).

Significantly, the trial judge's instructions never commented on the *prosecution's* burden of proving the defendant's guilt beyond a reasonable doubt. Instead, the jury was told to convict "if and only if" they

"believe[d] from the evidence beyond a reasonable doubt" the facts constituting the elements of the charged offense and to acquit "if upon the whole case" they had "a reasonable doubt as to the defendant's guilt" (App., p. 40). While the semantical constructions utilized by the trial court may not be constitutionally bankrupt in advising the jury of the due process guarantee of the reasonable-doubt standard, the phraseology employed did little to convey to the jury that it is the prosecution's duty "to adduce evidence and to produce persuasion beyond a reasonable doubt." 9 WIGMORE, *supra* §2511 at 407.

Obvious constitutional deficiencies in the trial court's definition of the term "reasonable doubt" undermined Michael Taylor's right to the presumption of innocence until proven guilty beyond a reasonable doubt.

The phrase "you must ask yourselves not whether a better case might have been proven" in a reasonable doubt instruction diminishes the protective validity of the reasonable doubt standard. This is particularly true since "[a]ll the authorities agree that to constitute a reasonable doubt there must be actual and substantial doubt of the defendant's guilt from the evidence, *or from a want of evidence.*" 30 AM JUR 2d EVIDENCE §1171, p. 351 (emphasis added). *See* 1 C. TORCIA, WHARTON'S CRIMINAL EVIDENCE §12, at 18; *Holland v. United States*, 348 U.S. 121 (1954). This Court in *Johnson v. Louisiana*, 406 U.S. 356, 360 (1972), judicially noted that "[n]umerous cases have defined a reasonable doubt as one ' "based on reason which arises from the evidence or lack of evidence." ' "

The definition of reasonable doubt given by the trial court below negated the universally accepted concept

that a reasonable doubt may arise from the lack or want of evidence in the case. By denying the jury the opportunity to ask themselves "whether a better case might have been proven" the court precluded the jury from arriving at a reasonable doubt if the evidence introduced at trial was of an unsatisfactory nature. Such a diminution of the constitutionally based "reasonable doubt" standard can not be sanctioned in a case where the trial judge expressly refuses a defense request for an instruction on the presumption of innocence.

Other courts have evaluated this type of definition of reasonable doubt and found it constitutionally lacking. For example, the Court of Appeals of Michigan in *People v. Davies*, Mich., 190 N.W.2d 694 (1971), condemned an instruction which likewise diminished the prophylactic nature of the reasonable doubt standard. The *Davies* court, after noting that "[a] reasonable doubt *may* arise 'from the lack, want or insufficiency of the evidence for the State' " concluded that "*it was error to instruct the jury*, as the judge did here, *that a reasonable doubt may not be based on the lack of evidence or the unsatisfactory nature of the evidence.*" *Id.* at 698 (emphasis supplied). *See State v. Blue*, 136 Mo. 41, 37 S.W. 796 (1896).

Admittedly the language used by the trial court below in defining reasonable doubt has been expressly approved by the appellate courts of Kentucky. *Merritt v. Commonwealth*, Ky., 386 S.W.2d 727, 729 (1965); *Whitaker v. Commonwealth*, Ky., 418 S.W.2d 750 (1967). Nevertheless, the conclusion is undeniable that such a definition by its very nature weakened the trial court's instruction that petitioner should be acquitted

"if upon the whole case" the jury has "a reasonable doubt as to the defendant's guilt" (App., p. 40).

Not only did this phrase in the definition diminish the validity of the protective reasonable-doubt standard but it also eviscerated petitioner's presumption of innocence in that it allowed the jury to overcome this fundamental presumption with less than satisfactory proof.

Although both trial defense counsel and the prosecutor referred to the "presumption of innocence" during *voir dire* of the jury and in their closing arguments, those references by counsel cannot be equated with a judicial charge advising the jury of the presumption of innocence and its function. Indeed, it is difficult to believe that the statements and arguments of counsel would have the same impact on the jurors as would an instruction. *People v. Donald*, 21 Ill. App.3d 696, 315 N.E.2d 904, 906 (1974).

This exact point was addressed in *United States v. Nelson*, 498 F.2d 1247 (5th Cir. 1974), where the defendants asserted on appeal that the trial court committed reversible error when it failed to instruct on the presumption of innocence. The court in *Nelson* was "not persuaded by the government's argument that references to the presumption by the court and counsel throughout the proceedings, from voir dire to closing argument, adequately apprised the jury of the presumption of innocence." *Id.* at 1248. Rejecting the government's argument, the *Nelson* court observed that "even continual references throughout the proceedings do not sufficiently remind the jury at the conclusion of the evidence" of the presumption of innocence and its function in a criminal trial. *Id.* at 1249.

As a preface to his instructions, the trial judge in the instant case told the jury, "*These are your instructions as to the law applicable* to the facts you've heard in evidence from the witness stand *in this case*" (App., p. 40; emphasis added). This remark clearly informed the jurors that the only law to be applied by them in Michael Taylor's case was that contained in the instructions presented by the judge. *See People v. Donald, supra*; this case also rejects the contention that the statements and arguments of counsel could fully inform the jury of the defendant's presumption of innocence and, consequently, obviate the need for an instruction on the presumption.

Even though trial defense counsel in the case at bar discussed the presumption of innocence during *voir dire* of the jurors, he expressly told the jury panel, "the Judge *will instruct* you that the defendant is presumed innocent until proven guilty . . . beyond a reasonable doubt" (App., p. 21; emphasis added). Consequently, when the trial judge's instructions contained no mention of the defendant's presumption of innocence, the jury obviously was skeptical of the emphasis petitioner's counsel had placed on that presumption during the trial. This factor also undermines any suggestion that the remarks of counsel in the instant case remedied the trial court's refusal to instruct on the presumption of innocence.

A defendant is "entitled to have the jury instructed as to the presumption of innocence at the time when they [are] given the other instructions in the case." *Dodson v. United States, supra* at 403. This is true for several reasons. First, "[j]urors understand that they are to be guided in their deliberations by the

instructions given them after the testimony is concluded." *Id.* Second, even "an instruction given at the beginning of the trial [not to mention statements of counsel during *voir dire*] is likely to be forgotten or misunderstood" by the jury. *Id.* Third, the jury might well conclude that statements of counsel or even a judicial charge "given at the beginning of the trial, and not along with the other instructions," is "not a matter which they [are] to consider in their deliberations." *Id.*

To assume in the case at bar that the jury afforded Michael Taylor the presumption of innocence is to engage in rank speculation. "[A] court presumes that the jury applies only the law of which it is informed by the judge." *Braley v. Gladden*, 403 F.2d 858, 860 (9th Cir. 1968). Consequently, "[c]ritical deficiencies cannot be supplied by inference or assumption as to the interpretation applied subjectively by twelve jurors, individually and collectively." *Id.*

Early in his summation, with knowledge that the trial court had declined to instruct the jury on the presumption of innocence, the prosecutor vigorously assailed the presumption:

> This defendant, like every other defendant who's ever been tried who's in the penitentiary or in the reformatory today, has this presumption of innocence until proven guilty beyond a reasonable doubt. That's just a presumption on his behalf. . . (App., p. 45).

By equating the presumption of innocence with those defendants who had been tried, convicted, and sentenced to incarceration in the penal institutions of Kentucky, the prosecutor's argument sought to convince the jury that the presumption itself was more properly

associated with guilty defendants who had been tried and convicted in a court of law. Equally unfair was the argument's implication that the presumption of innocence itself was of no real consequence since it had not precluded the conviction and imprisonment of all those defendants who were at that time inmates of the state's correctional institutions.

Undoubtedly, the prosecutor's intentional denigration of the presumption of innocence was calculated to influence the jury to reject any presumption of innocence and, instead, to perceive Michael Taylor with suspicion and apprehension solely because of his status as a defendant.

After this disparagement of the presumption of innocence, the prosecutor addressed the "reasonable doubt" standard of proof and told the jury that the trial judge in his instruction had defined the term "reasonable doubt" as "a substantial doubt, *a big doubt*, a real doubt" (App., p. 45; emphasis added). Of course, an examination of the court's instruction reveals that reasonable doubt was never defined as "a big doubt" (App., p. 40). Not content with the prosecution-oriented instruction on the definition of reasonable doubt given by the trial court, the prosecutor elected to misquote the instruction and offer the phrase "a big doubt" as a synonym for "reasonable doubt." Certainly the prosecution's probability of obtaining petitioner's conviction was enhanced if one or more of the jurors substituted the phrase "a big doubt" for "reasonable doubt" in determining whether petitioner's guilt had been established in conformity with the proper standard of proof.

Throughout his closing argument, the prosecutor in the instant case maligned petitioner's character and, without any evidentiary predicate, implied petitioner was a seasoned criminal. Early in his argument the prosecutor commented, "this defendant is sharp enough he knows to get rid of the wallet and things of that nature" (App., p. 45). Continuing this theme, the prosecutor explained to the jury, "You don't keep evidence of a crime around" (App., p. 45). The impact of this line of argument in the instant case is dramatic. The prosecutor, keenly aware that he lacked any evidence – either physical or testimonial – to corroborate the testimony of his only witness, elected to argue to the jury that the *absence* of incriminating evidence against Michael Taylor was in actuality an indication that the defendant was a crafty and experienced criminal.

To add credence to this argument, the prosecutor advised the jury, "One of the first things *defendants* do after they rip someone off, they get rid of the evidence as fast and as quickly as they can" (App., p. 45; emphasis added). Of course, the prosecutor had introduced no evidence to this effect and was merely voicing his own opinion in the matter. More importantly, though, the prosecution had produced no evidence which would permit an inference that Michael Taylor had taken steps to divest himself of the proceeds of the charged crime. Finally, the comment itself revealed to the jury that the prosecutor had little or no respect for a defendant's presumption of innocence. Interestingly, the prosecutor used the word "defendants," not "criminals," when he expressed the idea that after a crime one of the first things the perpetrators do is to "get rid of the evidence."

Continuing his efforts to shore up the obvious weaknesses in his case, the prosecutor attempted to dwell on the "contrast" between the defendant and the complaining witness. Prefacing this argument, the prosecutor advised the jury that "[t]his is merely a case of contrast in a large sense" (App., p. 45). Focusing on the age difference, the prosecutor emphasized that the case involved "a very youthful defendant" and "a gentleman who is the complaining witness two and half times his age" (App., p. 45). By contrasting petitioner's status as a "defendant" and his extreme "youth" with the witness' status as a mature "gentleman," the prosecutor abused the presumption of innocence by insinuating that irrelevant factors such as age and status could be considered by the jury as indicia of guilt.

Next, without an iota of evidence to support his argument, the prosecutor told the jurors:

> You have one who pays for what he gets; *the other who takes what he wants.* You have one who respects the law and who works at it six days a week; *you have another one who has no respect for the law* (App., p. 45; emphasis added).

None of these remarks had any foundation in the evidence, yet the prosecutor emphatically asserted them to the jury. Undoubtedly, the ultimate effect of these remarks was to depict Michael Taylor as a professional criminal, while painting the prosecution's only witness as a hard-working, law-abiding citizen.[13]

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[13]In Kentucky a prosecutor's labeling of an accused as a "professional criminal," either explicitly or by innuendo, is highly improper and extremely prejudicial. *Lynch v. Commonwealth*, Ky., 472 S.W.2d 263 (1971).

It should be noted that the Kentucky Court of Appeals expressly found in the case at bar that "[i]n his closing argument the prosecutor made reference to facts which had not been placed into evidence concerning the defendant's character." *Taylor v. Commonwealth, supra* at 814.

Moments later the prosecutor turned his criticism to defendants in general and informed the jurors that "they [defendants] like to come into court and play on your sympathy" (App., p. 46). Enlarging this concept, the prosecutor asserted, "They [defendants] don't want you to make your mind go back to the crime and to those events that took place" (App., p. 46). According to the prosecutor, defendants want the jurors "to look at them" and believe the defendants are incapable of committing crime (App., p. 46). Certainly the presumption of innocence has little vitality when a prosecutor can advise the jury that generally the accused in a criminal case is simply appealing to the jurors' sympathy and attempting to divert the jury's attention from the crime itself, while the trial judge can with impunity refuse a defense request for an instruction on the presumption of innocence.

Next the prosecutor averred that the "motive" for the robbery was "money" because Michael Taylor "was working part time . . . at Spencer's Cafe cleaning up for just a few dollars a week" (App., p. 46). Even though petitioner had testified that he earned forty dollars a week at his part-time job and lived at his parents' home, the prosecutor attempted to turn petitioner's economic status into a liability – a presumption of guilt based on a low weekly income. In the instant case the prosecutor adduced no evidence that Michael Taylor

was in need of additional funds or had voiced a desire to secure some easy money. Consequently, the prosecutor's theory was based solely on petitioner's economic status. It has been recognized that "where evidence of impecuniosity of a defendant may tend to prove motive or willingness to commit a crime . . . it should not be admitted and, as naturally follows, it should not be commented upon." *State v. Copeland,* 94 N.J. Super. 196, 227 A.2d 523, 526 (1967). Here petitioner had a part-time job, a regular weekly salary and a place to live; petitioner was certainly not impecunious. The prosecutor's perverted use of petitioner's part-time job and low salary mocked the constitutional guarantee of a presumption of innocence.

The prosecutor also advised the jury that to determine who is telling the truth they should ascertain "who would be most likely to tell you the truth" (App., p. 47). Emphasizing that Mr. Maddox had nothing to gain "by making a charge" against petitioner and "by coming to court," the prosecutor rhetorically asked, "What reason would he [Mr. Maddox] have to tell you other than the truth?" (App., p. 47). Assessing Michael Taylor's motivation, the prosecutor speculated:

> Now, look at this defendant. What reason would he have to tell you the truth? Not any because he knows if he tells you what he did you're going to give him what he deserves, a trip to the penitentiary. That's exactly what he's earned (App., p. 47).

Such an argument is undeniably premised on the theory that a defendant's testimonial protestations of innocence must be viewed as a lie simply because a defendant inevitably faces the possibility of conviction

and incarceration and, therefore, has a motive for denying his guilt. Certainly this type of argument by a prosecutor, even with its apparent fallacy, is not compatible with a defendant's constitutionally guaranteed presumption of innocence.

In the final moments of his closing argument, the prosecutor, building supposition upon speculation, professed knowledge of Michael Taylor's personal philosophy:

> In closing, he's got a very simple philosophy. This defendant says what's mine is mine; I will keep it. What's your is mine; I will take it. That's not only his philosophy, that's what he practices (App., p. 49).

Since the trial transcript contains no factual predicate for this argumentation, the prosecutor undoubtedly deduced his theory of petitioner's philosophy from the nature of the offense charged in the indictment – robbery. Postulating a course of conduct or a personal philosophy on the basis of an accusation in an indictment is not only improper argumentation, it is an affront to the presumption of innocence and the constitutional right to a fair trial.

Admittedly, the trial defense counsel did not object to the patent improprieties in the prosecutor's closing argument and this procedural defect by counsel precluded the possibility of reversal by the state appellate court on the basis of the prosecution's improper and prejudicial argument. *Taylor v. Commonwealth, supra* at 814. Nevertheless, the instances of improper argument by the prosecutor in the case *sub judice*, particularly those which conflicted with the presumption of innocence or the reasonable-doubt

standard of proof, must be evaluated to determine whether the other major components of petitioner's trial were conducted in conformity with the presumption of innocence.

Indeed, the "synergistic effect" of the combination of a "failure to charge on the presumption of innocence" *sua sponte* and a "prejudicial prosecutorial argument," presented without defense objection, has been held to be "fatal to the vitality" of a criminal conviction. *United States v. Fernandez, supra* at 1303. In the cited case the court reasoned that although the accused "was entitled to be tried with the presumption of innocence," he was "required to undergo trial in the face of argument by a representative of . . . his government, which strove to impose what amounted to a 'presumption of guilt.'" *Id.* That same "synergistic effect" has occurred in petitioner's case.

One other factor merits consideration. In his opening statement the prosecutor told the jury that the evidence for the prosecution would include proof that the robbery victim "took out" a warrant and the grand jury had returned an indictment against petitioner (App., p. 22). True to his word, the prosecutor, during his direct examination of the alleged robbery victim, elicited that the witness had both taken out a warrant against petitioner and had appeared before the local grand jury to seek an indictment in this matter (App., p. 28). By emphasizing that the prosecution's only witness had sought and obtained both a warrant and an indictment against petitioner, the prosecutor injected these irrelevant factors, complete with their accompanying stigma of suspicision, into the pool of evidence that the jury had to evaluate in determining Michael Taylor's guilt or

innocence. Such an overemphasis of the warrant and indictment is inconsistent with the constitutional guarantee of a presumption of innocence (see Argument II, *infra*).

A review of the other "components of the trial" in the case *sub judice* clearly demonstrates that the "testimony of witnesses, argument of counsel," and even "instruction of the jury by the judge" magnified rather than minimized the prejudice inflicted on Michael Taylor by the trial judge's refusal to give the defense requested instruction on the presumption of innocence. *Cupp v. Naughten, supra* at 147; *Henderson v. Kibbe, supra*, 97 S.Ct. at 1736 n.10.

In *People v. Dornblut*, 24 A.D.2d 639, 262 N.Y.S.2d 414 (1965), three of the five appellate judges on the panel, in a concurring opinion, lamented the probable demise of the presumption of innocence as a prophylactic right of the accused in a criminal trial. Because the presumption of innocence "has been such a fundamental concept of Anglo-American law," the concurring judges did "foresee *with regret* its disappearance from the criminal jury trial." *Id.*, 262 N.Y.S.2d at 416 (Christ, J., concurring); emphasis added. The three judges cautioned that "[i]f appellate courts do not insist that the historic presumption of innocence must be explicitly charged" and "called to the jury's attention, we will soon have dissipated and lost a great protective right of every defendant in a criminal case." *Id.*

Voicing that same concern, the dissenting judge in the case at bar observed that "[t]he law builds in the presumption of innocence, but it is of no use to the defendant if the jury is never told about it." *Taylor v. Commonwealth, supra* at 814 (Wilhoit, J., dissenting).

As long ago as 1895 this Court addressed this reality and enunicated that the "inevitable tendency to obscure" a "forgotten or ignored" truth "admonishes that the protection of so vital and fundamental a principle as the presumption of innocence be not denied, when requested, to any one accused of crime." *Coffin v. United States, supra* at 460.

In the final analysis there exists no legal nor logical justification for a trial judge's refusal to give an instruction on the presumption of innocence, when such an instruction is requested. The instruction need neither confuse nor mislead the jury. Instead, the instruction implements a fundamental constitutional right, essential to the right of a fair trial and guaranteed by the Fourteenth Amendment.

Accordingly, the decision of the state appellate court in the instant case to deny Michael Taylor the protection of an instruction on the presumption of innocence was "plainly inconsistent with the constitutionally rooted presumption of innocence" and "so infected the entire trial that the resulting conviction violates due process." *Cool v. United States, supra; Cupp v. Naughten, supra.*

II.

PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHT TO DUE PROCESS BY THE REFUSAL OF THE TRIAL COURT TO GIVE AN INSTRUCTION ON THE INDICTMENT'S LACK OF EVIDENTIARY VALUE WHEN PETITIONER'S COUNSEL REQUESTED AND TENDERED SUCH AN INSTRUCTION.

After the jury was sworn, the trial judge, in the presence of the jury, told the prosecutor, "Mr. Corns, you may read the indictment and state your case" (App., p. 21). During his opening statement, the prosecutor told the jurors that "the essence of the evidence of the Commonwealth" would include that the robbery victim "came down and took out the warrant and the Grand Jury returned this indictment" (App., p. 22). At the conclusion of his brief opening remarks, the prosecutor informed the jury of the contents of the indictment:

> It's our duty at this time to read to you the indictment that sets forth the charge. Commonwealth of Kentucky versus Michael Taylor, Indictment Number 7844. The Grand Jury charges on or about the 16th day of February, 1976, in Franklin County, Kentucky, the above-named defendant did commit the offense of robbery in the second degree when in the course of committing theft he used physical force upon James Maddox at the latter's residence, 249 Rosewood, Frankfort, Kentucky, and the defendant unlawfully took from Mr. Maddox a wallet containing ten to fifteen dollars and his house key, against the peace and dignity of the Commonwealth of Kentucky, a

> True Bill, signed John M. Arnold, Foreman of the March, 1976, Franklin County Grand Jury (App., p. 23).

Later, during the prosecutor's questioning of James Maddox, the alleged robbery victim, the following colloquy occurred:

> Q. 35 Did you subsequently take out a warrant against Mike Taylor?
>
> A. Yeah.
>
> Q. 36 *And then you later appeared before the Franklin County Grand Jury to seek an indictment?*
>
> A. Yes, sir (App., p. 28; emphasis added).

By informing the jury that Mr. Maddox, the prosecution's only witness, had appeared before the Franklin County Grand Jury to seek an indictment, the prosecutor was able to convey to the jurors that the indictment of petitioner was an explicit affirmation by the grand jury of the veracity of Mr. Maddox's allegation that petitioner robbed him.

In view of the paucity of evidence against petitioner and the prosecutor's calculated emphasis of the grand jury's decision to indict petitioner on the basis of Mr. Maddox's testimony, defense counsel requested the trial judge to give the following instruction (App., pp. 39-40):

> The jury is instructed that an indictment is in no way any evidence against the defendant and no adverse inference can be drawn against the defendant. The indictment is merely a written accusation charging the defendant with the commission of a crime. It has no probative force and carries with it no implication of guilt (Defense Instruction No. 5; App., p. 53).

The trial court declined to give the requested instruction on the indictment's lack of evidentiary value (App., pp. 39-40).

After the jury returned its verdict, petitioner's counsel, by leave of court, expanded his prior objection to the trial judge's refusal to give the instruction on the indictment's lack of evidentiary value:

> The defendant objects to the failure of the Court to give tendered instruction number five which provides an instruction to the jury that the indictment which was read into evidence is in no way any evidence against the defendant and that no adverse inference can be drawn against the defendant from a finding of the indictment. The defendant states that the failure of the Court to so instruct the jury is prejudicial against the defendant because the jury is left free to consider the indictment as probative evidence just as any other evidence which they heard during the trial of this action and unless the jury is instructed that the indictment has no probative force and carries no implication of guilt then.the jury is left free to consider this evidence as it considers all other evidence which it received in the trial of this case (App., p. 51).

The Kentucky Court of Appeals summarily rejected petitioner's contention that he was substantially prejudiced by the trial court's failure to instruct on the indictment's lack of evidentiary value, noting that they found "no merit" in petitioner's argument that "failure to give such an instruction denies the defendant due process of the law." *Taylor v. Commonwealth, supra* at 814.

This issue has been addressed by numerous federal courts. For example, in *United States v. Schanerman,*

150 F.2d 941 (3rd Cir. 1945), the court, in reversing a conviction for the trial judge's failure to give the jury an instruction on the indictment's lack of evidentiary value, observed:

> It seems settled that, where a correct proposition of law essential to the proper determination of an issue submitted to a jury is incorporated by the defendant into a requested special instruction, which is not covered in the general charge of the court, refusal to give the instruction is reversible error. [Citations omitted].
>
> When requested so to do, as in the instant case, the district court, in clear, unmistakable words, should have charged the jury that the finding of an indictment is no evidence of the guilt of the accused. *Id.* at 946.

Other decisions requiring an instruction on the evidentiary value of the indictment include: *Little v. United States,* 73 F.2d 861, 96 A.L.R. 889 (10th Cir. 1934); *Cooper v. United States,* 9 F.2d 216 (8th Cir. 1925); *Gold v. United States,* 102 F.2d 350 (3rd Cir. 1939); and *Whittlesey v. United States,* D.C., 221 A.2d 86 (1966).

Although the reading of the indictment to the jury is not an improper practice, a defendant in most jurisdictions is entitled, upon request, to an instruction that the indictment is only a formal charge and not evidence of guilt.

In *Kroll v. United States,* 433 F.2d 1282, 1287 (5th Cir. 1970), the defendant asserted on appeal "that it was error for the trial judge to read the indictment to the jury." The Fifth Circuit Court of Appeals rejected that allegation of error because:

> [t]he trial judge's instructions informed the jury that the indictment was not evidence, that it did not raise a suspicion of guilt, and that it was merely the method by which persons are charged and brought to trial. [Citations omitted.] *Id.* at 1287.

Similarly, in *United States v. Stroble*, 431 F.2d 1273, 1275 (6th Cir. 1970), the defendants had moved for a mistrial because, subsequent to the selection of the jury, but prior to the introduction of any evidence, "the [trial] judge had read the indictment to the prospective jurors." Answering this allegation of error, the Sixth Circuit Court of Appeals explained:

> Having at the time of the reading of the indictment, and in the general charge, thoroughly and properly instructed the jury as to the function of the indictment in a criminal case the court was correct in overruling the motion for a mistrial. *Id.* at 1275.

It is obvious that once the indictment is read to the jury, the defense, upon request, is entitled to an instruction which informs the jury that the indictment has no evidentiary value.

Within the context of Michael Taylor's trial, the defense instruction pertaining to the indictment was necessary to protect petitioner's constitutional right to a fair trial. The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment. *Drope v. Missouri*, 420 U.S. 162, 172 (1975); *Estelle v. Williams, supra* at 503.

After acknowledging that "[t]he presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice," this Court in *Estelle v. Williams, supra* at 503, articulated the methodology by which the presumption of innocence functions to insure no substantial deviation from the constitutionally mandated "fair trial." "To implement the presumption, courts must be alert to factors that may undermine the fairness of the fact-finding process." *Id.* Reasoning from this premise, this Court concluded, "In the administration of criminal justice, courts must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt." *Id.*, citing *In re Winship*, 397 U.S. 358 (1970).

In the case at bar, the trial court's refusal to instruct the jury, in accordance with the defense request, that "an indictment is in no way any evidence against the defendant," that "no adverse inference can be drawn against the defendant from the finding of the indictment," that the indictment "is merely a written accusation," having "no probative force" and carrying "no implication of guilt," obviously diluted the constitutional principle that guilt must be established by probative evidence beyond a reasonable doubt. In the absence of the requested instruction, the jury was allowed to speculate that the grand jury's indictment was an explicit endorsement of Mr. Maddox's credibility and, hence, further evidence of petitioner's guilt. Under these circumstances, particularly in view of the sparsity of the prosecution's evidence, the trial court's refusal to give the "indictment" instruction was substantial error of constitutional dimension.

Certainly the circumstances of the case at bar dramatically demonstrate the necessity of the requested instruction to insure petitioner the due process

guarantee of a fair trial. Early in the trial the jurors had heard the trial judge direct the prosecutor to read the indictment to them (App., p. 21). Shortly thereafter the prosecutor, an elected official of their community, told them in his opening statement that the Commonwealth's evidence included the fact that the only prosecution witness had taken out the warrant in the case and the local grand jury had returned the indictment in question (App., p. 22). The prosecutor, stressing that he was performing a "duty," then read the entire indictment to the jury (App., p. 23). And finally, just as he predicted in his opening statement, the prosecutor elicited from the Commonwealth's only witness that he had taken out a warrant against Michael Taylor for the alleged crime and had appeared before the grand jury to seek an indictment (App., p. 28). This scenario reveals that the indictment that charged Michael Taylor with the robbery of Mr. Maddox undoubtedly assumed evidentiary proportions as petitioner's trial progressed. "[C]ourts justifiably have been concerned that overemphasis of the indictment may lead the jury to construe the indictment as evidence of guilt of the accused." *United States v. Press,* 336 F.2d 1003, 1016-17 (2nd Cir. 1964). For this reason, "the limiting instructions of the trial court are of particular importance." *Id.* at 1017. Consequently, the trial judge's refusal in the instant case to instruct on the indictment's lack of evidentiary value was "plainly inconsistent with the constitutionally rooted presumption of innocence." *Cool v. United States, supra* at 104.

Furthermore, in the instant case the trial judge not only refused to instruct on the indictment's lack of

evidentiary value, he also declined a defense request to instruct on the presumption of innocence. Without either an instruction on the presumption of innocence or an instruction declaring the indictment devoid of evidentiary value, the jury was free to utilize the numerous references to the indictment as evidence of petitioner's guilt. When the jury has no basis for distinguishing the indictment itself from the evidence admitted at trial, a defendant loses his constitutional guarantees of a presumption of innocence and conviction only upon proof beyond a reasonable doubt. Thus, the trial court's refusal to instruct on the indictment's lack of evidentiary value "violated" the presumption of innocence "which was guaranteed to the defendant by the Fourteenth Amendment" and "so infected the entire trial that the resulting conviction violates due process." *Cupp v. Naughten, supra* at 146, 147.

While it is true that the defense attorney questioned the jury about the indictment's lack of evidentiary value, his questions and statements were never given the status of law by the trial judge. Furthermore, trial defense counsel's *voir dire* of the jury (App., p. 17) occurred early in the trial before the prosecutor read the indictment to the jury (App., p. 23) and before the prosecutor elicited from the only prosecution witness that he had testified before the grand jury prior to the issuance of the indictment (App., p. 28). Under these circumstances, trial defense counsel's mere *voir dire* of the jury concerning the indictment's lack of probative value could never negate the need for the trial court to instruct the jury, as requested, that an indictment lacks any evidentiary value. *See People v. Donald, supra;*

United States v. Nelson, supra; Dodson v. United States, supra.

The overemphasis of the indictment, whether intentional or inadvertent, created the very real danger that the jury would erroneously construe the indictment as evidence of Michael Taylor's guilt of the charged offense. In this context, the requested instruction on the indictment's lack of evidentiary value was essential to insure "the fairness of the fact-finding process." *Estelle v. Williams, supra* at 503. The denial of the requested instruction diluted "the principle that guilt is to be established by probative evidence and beyond a reasonable doubt." *Id.* The trial court's refusal to give the instruction at bar was "plainly inconsistent with the constitutionally rooted presumption of innocence." *Cool v. United States, supra.*

In the absence of an instruction on the presumption of innocence, the trial judge's decision to deprive Michael Taylor of the protection of an instruction on the indictment's lack of evidentiary value constituted a denial of due process, sufficient in magnitude to necessitate a reversal of petitioner's conviction.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals of Kentucky affirming petitioner's conviction should be reversed upon either or both of the grounds delineated above.

Respectfully submitted,

J. VINCENT APRILE II
Assistant Deputy Public Defender
Third Floor
State Office Building Annex
Frankfort, Kentucky 40601

Attorney for Petitioner

FOR ARGUMENT

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-5549

MICHAEL TAYLOR - - - - - Petitioner

versus

COMMONWEALTH OF KENTUCKY - Respondent

On Writ of Certiorari to the Court
of Appeals of Kentucky

BRIEF FOR RESPONDENT

ROBERT F. STEPHENS
Attorney General

GUY C. SHEARER
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601

On the Brief:

ROBERT L. CHENOWETH
Assistant Attorney General

JAMES M. RINGO
Assistant Deputy Attorney General
Counsel for Respondent

WESTERFIELD-BONTE CO., 618 W. KENTUCKY—P.O. BOX 3281, LOUISVILLE, KY.

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OF APPEALS OF KENTUCKY

BRIEF FOR RESPONDENT

OPINION BELOW

The Opinion of the Court of Appeals of Kentucky (Appendix, hereinafter designated App., pp. 54-58) is reported as *Taylor* v. *Commonwealth,* Ky. App., 551 S. W. 2d 813 (1977).

JURISDICTION

The opinion of the Court of Appeals of Kentucky in File No. CA-152-MR was entered on April 1, 1977. Petitioner's timely motion for discretionary review in the Supreme Court of Kentucky was denied on June 29,

1977 (Petitioner's App., p. 59). The mandate of the Court of Appeals of Kentucky was issued on July 11, 1977 (App., p. 60). The petition for writ of certiorari was granted on November 28, 1977. The jurisdiction of this Court is invoked on the basis of 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

1. Whether petitioner was deprived of his constitutional right to due process by the refusal of the trial court to give a requested instruction on the presumption of innocence.
2. Whether petitioner was denied his constitutional right to due process by the refusal of the trial court to give a requested instruction on the indictment's lack of evidentiary value.

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision petitioner has invoked is the Fourteenth Amendment to the Federal Constitution.

COUNTERSTATEMENT OF THE CASE

Respondent accepts petitioner's Statement of the Case as substantially correct and accurate. However, for the convenience of the Court, respondent believes that the Kentucky Court of Appeals succinctly capsulated the facts of this case as follows:

> "Michael Taylor was convicted by a Frankfort Circuit Court jury of violating Ky. Rev. Stat. Ch. 515.030 (hereinafter KRS), to wit second degree robbery. Evidence was presented that Taylor along with an accomplice went twice to the home of James Maddox on the evening of February 16, 1976. On the second visit when Maddox again would not allow them to enter his home, Taylor hit him and took his wallet and house key. Taylor and Maddox were the only witnesses to testify at the trial. Maddox testified that he had known Taylor for approximately 15 years and was certain he was the person who robbed him. The appellant denied the robbery testifying that he was in a parked automobile with three other persons the entire evening."

Additional facts and circumstances relevant to the issues raised by petitioner will be set forth in the respective arguments which follow.

SUMMARY OF ARGUMENT

It is not a part of an accused's right to a fair trial to have a state trial judge instruct the jury on the presumption of innocence. The requirement stated to lower federal trial courts in *Coffin* v. *United States,* 156 U. S. 432 (1895), that an instruction on the presumption of innocence was required was based upon a fundamental fallacy that this presumption is evidence in favor of the accused. This misconception has been corrected by this Court and the cases considered by this Court on this issue do not establish a constitutional rule that a fair trial by jury requires a court charge the presumption of innocence in addition to giving an adequate charge on reasonable doubt.

The highest appellate courts of the Commonwealth of Kentucky have consistently over the years held not only it unnecessary to give an instruction on presumption of innocence, even when requested and tendered, but that to give a presumption of innocence instruction would be misleading and would be an instruction too favorable to the accused. The rights of the accused are protected by the giving of an instruction on constitutional based standard of "beyond a reasonable doubt" and a definition of "reasonable doubt."

The presumption of innocence achieves its chief purpose as a procedural aid in compelling the state to assume and carry the burden of proving guilt, and the evidence produced must establish guilt beyond a reasonable doubt. The trial jury in the present case was adequately informed on the presumption of innocence by the voir dire interrogation of defense counsel and the prosecution and in the closing argument of the attorneys.

Before this Court may overturn a conviction resulting from a state trial in which a particular instruction was not given, it must be shown that the failure to give the instruction violated a right given to a defendant by the Fourteenth Amendment. This has not been shown in this case.

Moreover, there is no authority that would raise a requested instruction that an indictment lacks evidentiary value to a constitutional stature. An indictment in and of itself is never evidence of the guilt of the accused. However, where clear and correct instructions are given on reasonable doubt and the jury

has been informed by defense counsel that an indictment is merely a charging document and that it is not evidence, the resulting conviction is not invalid under the Fourteenth Amendment.

ARGUMENT

I.

Petitioner Was Not Deprived of His Constitutional Right to Due Process by the Refusal of the Trial Court to Give a Requested Instruction of the Presumption of Innocence.

This case involves one of the most basic principles extant in our criminal justice system—that there is something long referred to as a presumption of innocence for one accused of a crime. The question before this Court, however, is whether a criminal defendant has a constitutional right to an instruction on this presumption.

The respondent, hereafter "Commonwealth," would not begin to disagree with the proposition that the presumption of innocence is "a basic component of a fair trial under our system of criminal justice." *Estelle* v. *Williams,* 425 U. S. 501, 503 (1976). However, the Commonwealth strongly disagrees with the petitioner, hereafter "Mr. Taylor," that as a part of the right to a fair trial, one accused of a crime is constitutionally entitled to have a state trial judge instruct the jury on the presumption of innocence.

Mr. Taylor argues that the refusal by a state trial judge to give a presumption of innocence instruction

unconstitutionally affects a substantial right protected by the Fourteenth Amendment. In support of his argument he cites this Court's decision and opinion in *Coffin* v. *United States,* 156 U. S. 432 (1895). This Court's decision in *Coffin* is neither controlling in the present case nor does it reflect an accurate analysis of the legal principle of presumption of innocence.

This Court held in *Coffin* that the failure of the District Court of the United States for the District of Indiana to give a requested charge on the presumption of innocence was error requiring reversal. The opinion of this Court in *Coffin* declared "the presumuption of innocence is evidence in favor of the accused introduced by the law in his behalf. . . ." 156 U. S. at 460. But as stated in IX Wigmore on Evidence § 2511, pages 409-410, a "notable academic deliverance. . . . by the master in the law of Evidence (Professor James Bradley Thayer), laid bare the fallacy (that the legal presumption of innocence is to be regarded by the jury as a matter of evidence) with keen analysis." See Thayer, Preliminary Treatise on Evidence at the Common Law, Appendix B, The Presumption of Innocence in Criminal Cases, page 553 (1898). Wigmore further noted that the concept stated in the holding in *Coffin* of the presumption of innocence as evidence to be considered in favor of the accused was subsequently discarded by this Court in *Agnew* v. *United States,* 165 U. S. 36 (1897), and *Holt* v. *United States,* 218 U. S. 245 (1910). Id., at 410, footnote 5. Both of these cases involved the refusal by a lower *federal* court to instruct the jury in *Coffin* terms, that is, a refusal to

instruct the jury to consider the presumption of innocence as evidence in favor of the accused. The Court in *Agnew, supra,* declared that an instruction that the presumption of innocence is evidence was objectionable because of having a tendency to mislead. 165 U. S. at 52. It should be and probably is now generally agreed that the later cases of *Agnew* and *Holt* from this Court have, in the federal view of it, corrected the misconception created by *Coffin* that the presumption of innocence is evidence. Thus, the requirement stated to the lower federal trial courts in *Coffin* that an instruction on the presumption of innocence was required was based upon a fundamental fallacy. And, as stated in *United States Ex Rel. Campagne* v. *Follette,* 306 F. Supp. 1255, 1257 (E.D. N.Y. 1969), "plainly the cases in the Supreme Court cannot be said to adumbrate a rule of constitutional rigidity that fair trial by jury requires a court charge the presumption of innocence whether requested or not in addition to giving an adequate charge on reasonable doubt."

Lest it be forgotten, this case before the Court is a *state* case. Some states may have a criminal code or rule provision requiring an instruction on the presumption of innocence. See, for example, *Reynolds* v. *State,* 332 So. 2d 27 (Fla., 1976). This does not mean that other states with a different rule or the absence of one are in violation of the Constitution. Moreover, other states have judicially determined, some based upon the error of this Court's decision in *Coffin,* that a presumption of innocence instruction should be given

when requested. See *Ealey* v. *State,* 232 So. 2d 620 (Ga. 1977). None of the known of state court decisions, however, have held that the reason the presumption of innocence instruction is to be given is because of the Due Process Clause of the Fourteenth Amendment of our Federal Constitution.

The Commonwealth believes this Court is also of the decided opinion that a refusal by a state court to instruct on the presumption of innocence is not a denial of due process. In a case coming to this Court from a state criminal court in North Carolina, Mr. Justice Brewer, speaking for this Court in *Howard* v. *Fleming,* 191 U. S. 126, 136 and 137 (1903), stated:

> "Again, it is said that there was no due process, because the trial judge refused to instruct the jury on the presumption of innocence. He did charge that the guilt of the accused must be shown beyond a reasonable doubt, and that on a failure in this respect it was the duty to acquit. He also explained what is meant by the term 'reasonable doubt.' The supreme court (of North Carolina) sustained the charge. Of course, that is a decision of the highest court of the state that in a criminal trial it is sufficient to charge correctly in reference to a reasonable doubt, and that an omission to refer to any presumption of innocence does not invalidate the proceedings. In the face of this ruling as to the law of the state, the omission in a state trial of any reference to the presumption of innocence cannot be regarded as a denial of due process of law."

It must be understood in *Howard* that this Court determined that there had been a failure to pre[illegible]

the alleged error of constitutional magnitude. Mr. Justice Brewer prefaced that part of the opinion quoted above by saying: 191 U. S. at 135

> "The highest court of the state has affirmed the validity of the proceedings in that trial, and we may not interfere with its judgment unless some right guaranteed by the Federal Constitution was denied, and the proper steps taken to preserve for our consideration the question of that denial."

Nevertheless, in concluding the opinion, Mr. Justice Brewer stated: 191 U. S. at 137

> "The same questions were presented in the *habeas corpus* case, and as that comes to us from a Federal Court we have jurisdiction, and in that case the judgment will be
>
> Affirmed."

Thus, the determination in *Howard* that the refusal of a state court to instruct on presumption of innocence is not a violation of due process is not diminished. As in the *Howard* case, the Kentucky appellate court in the present case before this Court has determined that it is sufficient to charge correctly in reference to a reasonable doubt and this ruling should not be regarded as a denial of due process of law. The Commonwealth believes this Court has been and continues to be of that thinking. As recently as this Court's decision in *Patterson* v. *New York,* 432 U. S. 197, 201-202 (1977), it was stated in relevant part that:

> "It goes without saying that preventing and dealing with crime is much more the business of

the States than it is of the Federal Government, *Irvine* v. *California,* 347 U. S. 128, 134 (1954) (plurality opinion), and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. Among other things, it is 'normally within the power of the State to regulate procedures under which its laws are carried out, *including the burden of producing evidence and the burden of persuasion,'* and its decision in this regard is not subject to proscription under the Due Process Clause unless 'it offends some principle of justice so deeply rooted in the traditions and conscience of our people as to be ranked as fundamental.' *Speiser* v. *Randall,* 357 U. S. 513, 523 (1958); *Leland* v. *Organ,* 343 U. S. 790, 798 (1952); *Snyder* v. *Massachusetts,* 201 U. S. 97, 105 (1934). (Emphasis supplied.)

The highest appellate courts of the Commonwealth of Kentucky have consistently held not only it unnecessary to give an instruction on presumption of innocence, even when requested and tendered, but that to give a presumption of innocence instruction would be misleading and would be an instruction too favorable to the accused. In *Commonwealth* v. *Stites,* 190 Ky. 402, 227 S. W. 574, 576 (1921), the Kentucky Court of Appeals, the then highest appellate court, said:

> "We have repeatedly written that the reasonable doubt instruction in criminal cases should closely follow the words of Code, § 238. Instruction No. 4 reads:
>
> 'The law presumes the innocence of the accused, and it is the duty of the jury, if they can reasonably do so, to reconcile all the facts and circumstances of the case with that presumption; and if, upon the whole case, you entertain a reasonable doubt of the guilt of the accused, or of any material facts necessary to constitute his guilt of the offense charged in the indictment, as stated in instruction No. 1, having been proven, then you should find the defendant not guilty.'

While the instruction complained of has often been given, and has been before this court where the defendant was appealing, and we have held it not prejudicial to him, because too favorable to him, we do not think it should ever be given, for it amounts to a brief argument *in favor of the defendant.* Mickey v. Commonwealth, 9 Bush, 593; Ward v. Commonwealth, 14 Bush, 233; Breeden v. Commonwealth, 151 Ky. 217, 151 S. W. 407; Minniard v. Commonwealth, 158 Ky. 210, 164 S. W. 804; Clary v. Commonwealth, 163 Ky. 48, 173 S. W. 171; Mearns v. Commonwealth, 164 Ky. 213, 175 S. W. 355. If we follow this rule, as we must, the jury will be instructed:

> 'If you entertain a reasonable doubt from the evidence, of the guilt of the accused, he is entitled to an acquittal.'
>
> This should not be enlarged or elaborated, for the Code provision does not warrant it." (Emphasis supplied.)

Kentucky's Criminal Code of Practice § 238 stated:

> "Reasonable doubt entitles defendant to acquittal. If there be a reasonable doubt of the defendant being proven to be guilty, he is entitled to an acquittal."

(This Code provision is substantially incorporated into the present Rule 9.56 of the Kentucky Rules of Criminal Procedure). In a case from the Kentucky Court of Appeals following *Stites, supra,* in *Goodwin* v. *Commonwealth,* 214 Ky. 422, 283 S. W. 420 (1926), the court stated, in regard to an instruction similar to the one tendered in the instant case, that the tendered instruction was argumentative and therefore was properly refused. The court in *Goodwin* stated: 283 S. W. at 423

> "Instruction No. X, offered by appellants, was an argument in favor of the innocence of the accused and should never be given by a court to a jury, as has often been said by this court. It was sufficient for the court to say to the jury, 'If you have a reasonable doubt from the evidence that either of the defendants, C. A. Goodwin or Bryan Goodwin, have been proven to be guilty, then you will find him not guilty, and, if such doubt applies to both defendants, you will find both of them not guilty;' and it would have been improper for the court to have instructed the jury, as requested by appellants, that the law presumes the innocence of the defendants until their guilt has been proven beyond a reasonable doubt, and 'it is your duty, if you can reasonably do so, to reconcile all the facts and circumstances proven in the case with that presumption, and if upon the whole case you have a reasonable doubt of the defendants' having been proven guilty, you should find them not guilty.' We have so held in the cases of Brown v. Commonwealth, 198 Ky. 663, 249 S. W. 777; Mickey v. Commonwealth, 9 Bush, 593; Minniard v. Commonwealth, 158 Ky. 210, 164 S. W. 804; Clary v. Commonwealth, 163 Ky. 48, 173 S. W. 171; Commonwealth v. Stites, 190 Ky. 402, 227 S. W. 574."

Kentucky's courts have further stated that the rights of the accused are protected by the giving of an instruction on the standard of "beyond a reasonable doubt" and a definition of "reasonable doubt." *Mink* v. *Commonwealth,* 228 Ky. 674, 15 S. W. 2d 463 (1929); *Swango* v. *Commonwealth,* 291 Ky. 690, 165 S. W. 2d 182 (1942).

In the present case the trial court gave the following instructions: App. 40

> "The Court. All right. These are your instructions as to the law applicable to the facts you've heard in evidence from the witness stand in this case.
>
> Number one, you will find the defendant guilty under this instruction if and only if you believe from the evidence beyond a reasonable doubt all of the following: A. That in this county on or about February 16, 1976 and before the finding of the indictment herein, he the defendant stole a sum of money and a house key from James Maddox, 249 Rosewood, Frankfort, Kentucky; and B. in the course of so doing he used physical force on James Maddox. If you find the defendant guilty under this instruction you will fix his punishment at confinement in the penitentiary for not less than five nor more than ten years in your discretion.
>
> Number two, if upon the whole case you have a reasonable doubt as to the defendant's guilt you will find him not guilty. The term 'reasonable

> doubt' as used in these instructions means a substantial doubt, a real doubt, in that you must ask yourself not whether a better case might have been proved but whether after hearing all the evidence you actually doubt that the defendant is guilty."

These instructions follow nearly verbatim the suggested instructions on "reasonable doubt" contained in Sections 1.04 and 11.01 of Palmore's (Chief Justice of the Kentucky Supreme Court) *Kentucky Instructions to Juries, A Revision of Stanley,* Vol. 1, pages 4-5, 376-377. While Mr. Taylor, at pages 43 and 44 of his Brief for Petitioner, attacks the strength of the trial court's "reasonable doubt" instructions, we believe part of the court's opinion in *United States* v. *Pepe,* 501 F. 2d 1142, 1143 (10th Cir. 1974) is pertinent as a reply:

> "As an abstraction the concept of reasonable doubt is not susceptible to description by terms with sharply defined, concrete meanings. Resort must be to wording or language, the meaning of which will necessarily be colored by the experience of each individual. Thus while the term itself is common and readily associated by most individuals with our criminal justice system, it is unlikely that two persons would supply the same characterization of its meaning. These difficulties have been acknowledged by the Supreme Court, and the Court has expressed its doubts about the benefit of attempting a definition more elaborate than the term 'reasonable doubt' itself. Miles v. United States, 103 U. S. 304, 26 L. Ed. 481; Dunbar v. United States, 156 U. S. 185, 15 S. Ct. 325, 39 L. Ed. 390."

The Commonwealth does not argue or believe nor have the courts of review in this state ever held that there is not a difference between the principle of presumption of innocence and the standard of beyond a reasonable doubt. This Court, in *In Re Winship,* 397 U. S. 358, 365 (1970), citing *Coffin* v. *United States, supra,* stated:

> "The (reasonable-doubt) standard provides concrete substance for the presumption of innocence —that bedrock 'axiomatic and elementary' principle whose enforcement lies at the foundation of the administration of our criminal law."

This Court also held in *Winship, supra,* possibly the first time so explicitly: 397 U. S. at 364

> "Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."

Mr. Justice Black, dissenting in *Winship,* noted: 397 U. S. at 377

> "The Court has never clearly held, however, that proof beyond a reasonable doubt is either expressly or impliedly commanded by any provision of the Constitution."

But the Commonwealth does not question the constitutional basis for the standard of beyond a reasonable doubt. "Long before *Winship,* the universal rule in

this country was that the prosecution must prove guilt beyond a reasonable doubt." *Patterson* v. *New York, supra,* 432 U. S. at 211. Kentucky Criminal Code of Practice § 238, *supra.* This standard is "a prime instrument for reducing the risk of convictions resting on factual error." *Winship,* at 363.

The bedrock principle of presumption of innocence places upon the state the burden of proving guilt. The presumption of innocence achieves its chief purpose as a procedural aid in compelling the state to assume and carry that burden of proving guilt, and the evidence produced must establish guilt beyond a reasonable doubt. See McCormick on Evidence, 2d Ed., at page 806, footnote 43. The jury in the present case did not try the case unaware of the presumption of innocence. See *Henderson* v. *Kibbe,* —— U. S. ——, 52 L. Ed. 2d 203, 212 (1977). The prospective and accepted jurors were informed and interrogated more in the voir dire examination on the presumption of innocence and reasonable doubt than on anything else. This is apparent from reading several pages of the Transcript of Evidence: App. 18-21

> "[9] Have any of you heard or know anything about this particular case?
>
> Have any of you ever had occasion or the necessity to take out a warrant or to institute criminal proceedings before?
>
> I take it by your silence that you haven't.
>
> I'm sure you all will agree to this final question as regards the principle of innocence or reasonable doubt. Do each of you all agree and understand that Mike Taylor as he sits there today is a

young man who is presumed to be innocent of the charge of second degree robbery, that this innocence has to be overcome by the Commonwealth to meet a standard of what we call beyond a reasonable doubt and that in the event that at the conclusion of the evidence, you have a reasonable doubt then it is your duty to return a verdict of not guilty. Do each of you understand the principle of innocence, the requirement of reasonable doubt? That reasonable doubt must be removed in order to find a verdict of guilty?

Do each of you understand that principle and I try to make it as elementary as I can. Lawyers sometimes have a tendency to make things complicated but I hope I made it sufficiently clear.

[10] I take it by your silence that each of you does understand.

Thank you.

The Court: Take your list.

Mr. Corns: Commonwealth takes the jury, Your Honor.

The Court: Take your list, Mr. Judy.

Mr. Judy: Thank you, Your Honor. We'd like to deliberate for just a moment, if we could.

The Sheriff: Gus Smith, Christine Noblitt are excused.

The Court: Call two more jurors.

[Whereupon, Mr. William Sanders and Nancy Forsee were sworn by the Court.]

Mr. Corns: These questions will be directed to the last two members that have just joined the panel. Have you heard the questions I asked previously?

Mr. Sanders: Yes, sir.

Ms. Forsee: Yes, sir.

Mr. Corns: Having heard those questions do you know of any reason why either of you could not serve as a juror?

Mr. Judy, when he talked to the jurors, advised that each defendant is presumed innocent until proven guilty beyond a reasonable doubt. If you serve in this case will you follow that rule of law?

If, however, the Commonwealth does prove to your [11] satisfaction beyond a reasonable doubt that this defendant did commit the crime with which he's charged, will you return a verdict of guilty?

Do you know of any reason why, if you return a verdict of guilty, you could not fix his punishment between five and ten years in prison for second degree robbery?

If both of you serve will you give both the prosecution and the defense a fair trial?

Commonwealth passes, Your Honor.

Mr. Judy: May it please the Court, Mr. Corns. I also direct my attention to the last two who came on. You all were sitting in the back. Could you hear the questions that I generally asked?

Was there any question that I asked that you might have registered a reply in your mind that you would have answered if you had been sitting on the panel at that time?

Do either of you know socially or have you been represented by Mr. Corns or Mr. Prewitt?

Have either of you had the opportunity to take out a warrant initiating an action in court?

Do both of you subscribe to the principle of law and the Judge will instruct you that the defendant is presumed innocent until proven guilty with [12] sufficient proof to prove beyond a reasonable doubt for you to return a verdict of guilty?

Do you both recognize that it is equally a part of your duty as a juror to return a verdict of not guilty if you believe or have a reasonable doubt and that your duty is just as well served in returning a verdict of not guilty if you so believe as a guilty verdict if you believe he's guilty beyond a reasonable doubt?

Thank you.

The Court: Take your licks, Mr. Corns.

Mr. Corns: Commonwealth takes the jury, Your Honor.

The Court: Commonwealth accepts the jury.

Mr. Judy: Defendant accepts the jury, Your Honor."

The trial jury was most adequately informed and enlightened on the presumption of innocence by the voir dire interrogation of not only Mr. Taylor's trial counsel but also by the Commonwealth's attorney. Also, the presumption of innocence was hammered on in the closing argument of Mr. Taylor's trial counsel after the jury had been given the instructions by the court. Defense counsel argued: App. 43-44

> "Now, you've been given the instructions. As I indicated to you in the voir dire when we talked about the [41] questions and answers at the very beginning, that you all subscribe to the principle of the presumption of innocence, that Michael Taylor is presumed innocent—and I believe he is innocent—that that presumption remains with him throughout the trial. He has no burden to put on any proof and it is the, it's the obligation and responsibility of the Commonwealth to prove his guilt beyond a reasonable doubt.

Now, what is reasonable doubt? Well, I believe reasonable doubt is if you've heard one side of the testimony and you say well, I think that testimony is believable, the Commonwealth's testimony. Then you hear the defense testimony, the defendant testify and after the defendant gets off the stand you say I watched that fellow, I heard what he had to say and I don't, I just don't believe he's the one that did this thing.

Well, if you come to that impasse where you've got, where you believe the defendant equally as well as you do the prosecuting witness that's reasonable doubt. That's taking that Principle and applying it on a very basic level. That's the level that we have here."

Commonwealth's attorney also argued, in closing, presumption of innocence and reasonable doubt: App. 45.

"Before I talk with you further about the evidence let me mention a few things Mr. Judy has brought to your attention. First of all, reasonable doubt. This defendant, like every other defendant who's ever been tried who's in the penitentiary or in the reformatory today, has this presumption of innocenee until [43] proven guilty beyond a reasonable doubt. That's just a presumption on his behalf and if you will look at the instruction that the Court gave you as to what reasonable doubt is, I think you will conclude the Commonwealth has far in excess proved beyond a reasonable doubt, without a question, this defendant committed the crime with which he's charged. Notice how the Court has defined for you in the instruction the term 'reasonable doubt,' means a substantial doubt, a real doubt, in that you must ask yourself not

whether a better case might have been proved but whether after hearing all the evidence you actually doubt that the defendant is guilty."

Certainly, the omission of an instruction on the presumption of innocence did not "so (infect) the entire trial that the resulting conviction violated due process." *Henderson* v. *Kibbe, supra,* 52 L. Ed. 2d at 214.

The presumption of innocence cannot be said to have such specificity of function so as to make out a deprivation of due process, if the case has been fairly presented to the jury and the jury has been properly advised on the burden of proof. See *United States Ex Rel. Campagne* v. *Follette, supra,* 306 F. Supp. at 1258. In that "traditionally, due process has required only the most basic procedural safeguards be observed" *(Patterson* v. *New York, supra,* 432 U. S. at 210), the Commonwealth submits that it is sufficient, constitutionally, that a state have instructions that have "as their predominant theme that the burden of proof . . . (is) upon the Government at every stage to prove guilt beyond a reasonable doubt." Mr. Justice Rehnquist, dissenting in *Cool* v. *United States,* 409 U. S. 100, 107 (1972). A judgment of conviction is "the culmination of a trial which includes testimony of witnesses, argument of counsel, receipt of exhibits in evidence, and instruction of the jury by the judge." *Cupp* v. *Naughten,* 414 U. S. 141, 147 (1973). Instructions or the absence of a particular one is but one of the several components of a trial which may result in the judgment of conviction. *Id.* But also just as stated in *Cupp,* at 146, before a federal court may overturn a

conviction resulting from a state trial in which an instruction was used, "it must be established not merely that the instruction is undesirable, erroneous, or even 'universally condemned,' but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment," the Commonwealth contends in a state trial where a particular instruction was not given, even if failing to give such an instruction is "undesirable, erroneous, or even 'universally condemned,' " it must be shown that the failure to give this instruction violated a right given to a defendant by the Fourteenth Amendment. This Mr. Taylor has failed to do. The decision of the Kentucky Court of Appeals should be affirmed.

II.

Petitioner Was Not Denied His Constitutional Right to Due Process by the Refusal of the Trial Court to Give a Requested Instruction on the Indictment's Lack of Evidentiary Value.

Mr. Taylor's second argument is totally barren of a substantial federal question. The question presented to this Court here is simply does an accused have a right protected by the Due Process Clause of the Fourteenth Amendment to an instruction, when requested, that an indictment lacks evidentiary value. No authority has been cited and none is known that would raise such an instruction to a constitutional stature.

Long before the present case was reviewed by the Kentucky Court of Appeals, that court considered the

very argument here presented by Mr. Taylor. The Kentucky Court of Appeals in *Kelly* v. *Commonwealth,* 259 Ky. 770, 83 S. W. 2d 489, 490 (1935) stated:

> "Appellant argues that it is the duty of the court, upon request, to instruct the jury that an indictment is but a formal charge and furnishes no evidence of guilt. He relies upon 16 C.J. 983, § 2387. Various foreign, but no Kentucky, cases are cited in support of the text, and appellant quite frankly admits that there is no Kentucky decision on the question. We think that the 'reasonable doubt' instruction under section 238 of the Criminal Code of Practice amply protects the defendant, and that the trial court did not err in refusing the proffered instruction."

It is, thus, not disputed that an indictment in and of itself is never evidence of the guilt of an accused. But it is not error, let alone reversible error of constitutional magnitude, to fail to give an instruction in this regard.

Mr. Taylor cites several federal jurisdiction cases and a District of Columbia case, each of which have a central theme. As noted in *Whittlesey* v. *United States,* 221 A. 2d 86, 90 (D.C. 1966), it appears established by federal courts that when an information or indictment goes to the jury, and the defense counsel requests an instruction to the effect that the jury should not consider the information or indictment as evidence against the accused, a refusal to so instruct is reversible error. It would further appear that in federal courts whether the indictment or exhibits are taken into the jury room

rests with the sound discretion of the federal trial court. See *Little* v. *United States,* 73 F. 2d 861 (10th Cir. 1934), and also generally, *Garner* v. *United States,* 244 F. 2d 575 (6th Cir. 1957).

Again, this is not a federal case and there has never been asserted that the jury was permitted to take the indictment into the jury room with them. What may be the better practice required as a matter of judicial supervision by the various federal courts of appeals does not, without more, establish authority for requiring such an instruction as a matter of constitutional mandate. See *Cupp* v. *Naughten, supra,* 414 U. S. at 146. Under the circumstances of the present case, with the clear and correct instructions by the trial court on "reasonable doubt," coupled with the voir dire statements to the jury by defense counsel that an indictment is merely a charging document and that it is not evidence (App. 17), the resulting conviction of Mr. Taylor is not invalid under the Fourteenth Amendment.

CONCLUSION

Based upon the foregoing, the Commonwealth submits that Mr. Taylor received a fair trial. His trial was conducted within the law of the highest courts in Kentucky. Mr. Taylor was not deprived of any protected constitutional right. An accused is not entitled under the Fourteenth Amendment to an instruction on the presumption of innocence or that the indictment lacks evidentiary value. For these reasons, the

decision of the Kentucky Court of Appeals should be affirmed.

Respectfully submitted,

ROBERT F. STEPHENS
Attorney General

GUY C. SHEARER
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601

On the Brief:

ROBERT L. CHENOWETH
Assistant Attorney General

JAMES M. RINGO
Assistant Deputy Attorney General
Counsel for Respondent

CERTIFICATE OF SERVICE

I, Guy C. Shearer, one of counsel for respondent, hereby certify that the foregoing Brief for Respondent was served on petitioner by depositing three copies each of same in the United States mail, first class postage prepaid, this 2nd day of March, 1978, addressed to counsel for petitioner, HONORABLE J. VINCENT APRILE, II, Assistant Deputy Public Defender, State Office Bldg. Annex, Frankfort, Kentucky 40601.

GUY C. SHEARER
Assistant Attorney General
Office of the Attorney General
Capitol Building
Frankfort, Kentucky 40601

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-5549

MICHAEL TAYLOR,
Petitioner,

v.

COMMONWEALTH OF KENTUCKY,
Respondent.

ON WRIT OF CERTIORARI

TO THE COURT OF APPEALS OF KENTUCKY

PETITIONER'S REPLY BRIEF

QUESTIONS PRESENTED

1. Whether petitioner was deprived of his constitutional right to due process of law by the refusal of the trial court to give an instruction on the presumption of innocence when petitioner's counsel requested and tendered such an instruction.

2. Whether petitioner was denied his constitutional right to due process by the refusal of the trial court to give an instruction on the indictment's lack of evidentiary value when petitioner's counsel requested and tendered such an instruction.

FOR ARGUMENT

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J. VINCENT APRILE II
ASSISTANT DEPUTY PUBLIC DEFENDER
Third Floor
State Office Building Annex
Frankfort, Kentucky 40601

Attorney for Petitioner

ARGUMENT

I. PETITIONER WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW BY THE REFUSAL OF THE TRIAL COURT TO GIVE AN INSTRUCTION ON THE PRESUMPTION OF INNOCENCE WHEN PETITIONER'S COUNSEL REQUESTED AND TENDERED SUCH AN INSTRUCTION.

In response to this argument, the Commonwealth of Kentucky has challenged the viability of this Court's decision in Coffin v. United States, 156 U.S. 432 (1895), by asserting that "the requirement stated to the lower federal trial courts in Coffin that an instruction on the presumption of innocence was required was based upon a fundamental fallacy" (Respondent's Brief, p. 7). The implication of the Commonwealth's argument is that the Coffin decision no longer mandates the federal trial courts to instruct on the presumption of innocence when requested. Certainly the statement in Coffin that the presumption of innocence is evidence to be considered in favor of the accused has been eroded, if not negated, by this Court's later decisions in Agnew v. United States, 165 U.S. 36 (1897), and Holt v. United States, 218 U.S. 245 (1910), but that factor has not undone the basic holding of Coffin. As recently as 1974, the court in United States v. Fernandez, 496 F.2d 1294, 1298 (5th Cir. 1974), emphasized that "the Coffin holding that it is prejudicial error not to instruct on the presumption [of innocence] when requested" is still "[o]f unimpaired vitality" in the federal courts. Even United States v. Pepe, 501 F.2d 1142, 1143 (10th Cir. 1974), a case cited with approval by the respondent, emphasizes that a defendant in a federal criminal prosecution "is entitled to have his jury apprised of [the reasonable doubt] standard and its corollary, the presumption of innocence."

The Commonwealth also relies heavily on the comment in United States Ex Rel. Campagne v. Follette, 306 F. Supp. 1255, 1257 (E.D.N.Y. 1969), that "the cases in the Supreme

Court cannot be said to adumbrate a rule of constitutional rigidity that fair trial by jury requires that a court charge the presumption of innocence whether it is requested or not in addition to giving an adequate charge on reasonable doubt" (emphasis added).

As the court in Campagne apparently realized, this Court in Coffin, supra, and in Cochran v. United States, 157 U.S. 286 (1895), had addressed the specific issue of whether the protection of an instruction on the presumption of innocence could be denied, when requested, by the defendant. Indeed, none of this Court's decisions on the failure to instruct on the presumption of innocence had dealt with a trial judge's sua sponte duty to issue such an instruction.

In Campagne, supra, the federal court explained that "New York has consistently required the charge [on the presumption of innocence] to be given when requested." Id. at 1257. In fact, the charge on the presumption of innocence at that time "was usually given in New York" and "a failure to give it" was "ordinarily, reversible error." Id. at 1256. Significantly, the defendant's counsel in Campagne had neither tendered an instruction on the presumption of innocence nor objected to the trial court's omission to charge the jury on the presumption of innocence. Thus, the issue in Campagne was whether a state trial judge's failure to instruct sua sponte on the presumption of innocence constituted a denial of due process under the federal constitution. With the record in this posture, the federal court in Campagne was unable to construe the precedents in Coffin and Cochran, both supra, as dictating a federal constitutional principle that the absence of an instruction on the presumption of innocence, regardless of the circumstances, always denies a defendant a fair trial by jury and due process.

Additionally, the Campagne court delineated the panoply of instructions given by the state trial judge and noted the myriad cautionary instructions which were given to protect the defendants against an unwarranted conviction. Id. at 1258. For example, the jury was instructed, inter alia, that the indictment was not evidence against the defendants; that the defendants did not have to establish their innocence; that the prosecution had to prove its case by honest, credible evidence; that the proof had to be beyond a reasonable doubt; that the jury were the sole judges of the facts and the credibility of witnesses; that the identification evidence had to be weighed with the utmost caution and had to be sufficiently certain to preclude every possibility of mistake; that no unfavorable inference was to be drawn from a defendant's failure to testify; and that the defendant had no duty to establish his alibi beyond a reasonable doubt since the prosecution's burden of proving guilt beyond a reasonable doubt never shifted from the prosecution's shoulders. Id.

The abundance of cautionary instructions in the Campagne case is in marked contrast to the paucity of instructions given by the state trial judge in Michael Taylor's case.

When the circumstances present in Campagne and those of Michael Taylor's trial are juxtaposed, it is readily apparent that the two cases are inapposite.

According to the Commonwealth of Kentucky, this Court in Howard v. Fleming, 191 U.S. 126 (1903), specifically held that "a refusal by a state court to instruct on the presumption of innocence is not a denial of due process" (Respondent's Brief, p. 8). At the inception of its opinion, this Court in Howard observed that once a state court has affirmed the validity of the proceedings in a state trial, this Court "may not interfere with its judgment unless some right

guaranteed by the Federal Constitution was denied, and the proper steps taken to preserve for our consideration the question of that denial." Howard v. Fleming, supra at 135. This Court in the cited case noted that "[i]t does not appear that the Federal character of the questions was presented to the supreme court of the state." Id. at 137. Within this context, this Court in Howard, supra, never reached the merits of the issue argued by the defendants that "there was not due process, because the trial judge refused to instruct the jury on the presumption of innocence." Id. at 136.

Assuming arguendo that this Court would accept the Commonwealth's strained interpretation of Howard v. Fleming, supra, it must be recalled that some seventy-three years after Howard was decided this Court enunciated in Estelle v. Williams, 425 U.S. 501 (1976), that "[t]he presumption of innocence...is a basic component of a fair trial under our system of criminal justice" and that this "right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment." Id. at 503. Even if in 1903 this Court had not recognized that the presumption of innocence was part and parcel of the Fourteenth Amendment's guarantee of due process in state trials, it is beyond cavil that the parameters of due process now embody the full protection of the presumption of innocence.

Accordingly, the decision of the state appellate court in the instant case to deny Michael Taylor the protection of an instruction on the presumption of innocence was "plainly inconsistent with the constitutionally rooted presumption of innocence" and "so infected the entire trial that the resulting conviction violates due process." Cool v. United States, 409 U.S. 100 (1972); Cupp v. Naughten, 414 U.S. 141 (1973).

II.

PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHT TO DUE PROCESS BY THE REFUSAL OF THE TRIAL COURT TO GIVE AN INSTRUCTION ON THE INDICTMENT'S LACK OF EVIDENTIARY VALUE WHEN PETITIONER'S COUNSEL REQUESTED AND TENDERED SUCH AN INSTRUCTION.

Asserting that this argument "is totally barren of a substantial federal question," the Commonwealth maintains that Michael Taylor has cited no authority to raise this issue to "constitutional stature" (Respondent's Brief, p. 22).

Respondent's simplistic evaluation of this argument's constitutional ramifications obviously emanates from a failure to heed this Court's directive in Estelle v. Williams, 425 U.S. 501, 503 (1976), that implementation of the presumption of innocence requires constant vigilance against "factors that may undermine the fairness of the fact-finding process." Procedures which dilute "the principle that guilt is to be established by probative evidence and beyond a reasonable doubt" cannot be countenanced. Id.

While "[t]he actual impact of a particular practice on the judgment of jurors cannot always be determined," this Court "has left no doubt that the probability of deleterious effects on fundamental rights calls for close judicial scrutiny." Id. at 504, citing Estes v. Texas, 381 U.S. 532 (1965), and In re Murchison, 349 U.S. 133 (1955). Consequently, "[c]ourts must do the best they can to evaluate the likely effects of a particular procedure, based on reason, principle, and common human experience." Estelle v. Williams, supra at 504.

Assessed against these constitutional precepts, the overemphasis of the indictment, whether intentional or inadvertent, generated a substantial risk that the jury would erroneously construe the indictment as evidence of Michael Taylor's guilt of the charged offense. In this context, the requested instruction on the indictment's lack of evidentiary value was the only feasible method of implementing the constitutionally mandated presumption of innocence without emasculating the prosecution's right to have the indictment read to the jury.

The Commonwealth's tactic of addressing this issue in the abstract, without attention to the circumstances of the case at bar, reveals a basic misunderstanding of the constitutional interplay between the dynamics of the presumption of innocence and the Fourteenth Amendment's guarantee of the right to a fair trial. Estelle v. Williams, supra at 503; Drope v. Missouri, 420 U.S. 162, 172 (1975). The trial court's refusal to give the instruction at bar was "plainly inconsistent with the constitutionally rooted presumption of innocence." Cool v. United States, 409 U.S. 100, 104 (1972).

In the absence of an instruction on the presumption of innocence, the trial judge's decision to deprive Michael Taylor of the protection of an instruction on the indictment's lack of evidentiary value constituted a denial of due process, sufficient in magnitude to necessitate a reversal of petitioner's conviction.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals of Kentucky affirming petitioner's conviction should be reversed upon either or both of the grounds delineated above.

Respectfully submitted,

J. VINCENT APRILE II
ASSISTANT DEPUTY PUBLIC DEFENDER
Third Floor
State Office Building Annex
Frankfort, Kentucky 40601

Attorney for Petitioner

MARCH, 1978